(14)

No. 03-5554 Status: ARGUED
Title: Larry D. Hiibel, Petitioner
v.
Sixth Judicial District Court of Nevada, Humboldt County, et al.
Docketed: July 28, 2003
Lower Ct: Supreme Court of Nevada
Case Nos.: (38876)
Decision Date: December 20, 2002
Rehearing Denied: April 25, 2003

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jul 22 2003	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 27, 2003)
Aug 12 2003	Waiver of right of respondents Sixth Judicial District Court of Nevada, Humboldt County, et al. to respond filed.
Aug 21 2003	DISTRIBUTED for Conference of September 29, 2003.
Aug 28 2003	Response Requested . (Due September 29, 2003)
Sep 22 2003	Brief of respondents Sixth Judicial District Court of Nevada, Humboldt County, et al. in opposition filed.
Sep 24 2003	Reply of petitioner Larry D. Hiibel filed.
Oct 2 2003	DISTRIBUTED for Conference of October 17, 2003.
Oct 20 2003	Petition GRANTED.
Nov 14 2003	Joint appendix filed.
Nov 25 2003	Extension of time within which to file petitioner's brief on the merits to and including December 15, 2003.
Dec 15 2003	Brief amici curiae of Electronic Privacy Information Center, et al. filed.
Dec 15 2003	Brief amicus curiae of Cato Institute filed.
Dec 15 2003	Brief amicus curiae of American Civil Liberties Union filed.
Dec 15 2003	Brief amici curiae of PrivacyActivism, Cyber Privacy Project and FreeToTravel.Org filed.
Dec 15 2003	Brief amici curiae of National Law Center on Homelessness & Poverty, et al. filed.
Dec 15 2003	Brief amicus curiae of Electronic Frontier Foundation filed.
Dec 15 2003	Brief amicus curiae of John Gilmore filed.
Dec 15 2003	Brief of petitioner Larry D. Hiibel filed.
Jan 12 2004	SET FOR ARGUMENT Monday, March 22, 2004.
Jan 13 2004	Brief of respondents Sixth Judicial District Court of Nevada, Humboldt County, and Richard A. Wagner, District Judge filed.
Jan 20 2004	Brief amicus curiae of United States filed.
Jan 20 2004	Brief amicus curiae of National Association of Police Organizations filed. (Distributed)
Jan 20 2004	Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed)
Jan 21 2004	CIRCULATED.
Jan 27 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 17 2004	Reply of petitioner Larry D. Hiibel filed. (Distributed)

Feb 18 2004	Record received from the Supreme Court of Nevada. (1 envelope)
Feb 23 2004	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Mar 22 2004	Argued. For petitioner: Robert E. Dolan, Deputy Nevada State Public Defender, Winnemucca, Nev. For respondents: Conrad Hafen, Senior Deputy Attorney General, Las Vegas, Nev.; and on behalf of the United States, as amicus curiae, Sri Srinivasan, Assistant to the Solicitor General, Department of Justice, Washington, D.C.

03-5554 (14)

No. _____

FILED
JUL 22 2003
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

LARRY D. HIIBEL, Petitioner

v.

The SIXTH JUDICIAL DISTRICT COURT of the STATE OF NEVADA,
in and for the COUNTY OF HUMBOLDT, and the
Honorable Richard A. Wagner, District Judge, Respondents, and
THE STATE OF NEVADA, Real Party in Interest.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner Larry D. Hiibel, asks leave to file the accompanying petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

In the Justice's Court of Union Township, Humboldt County, State of Nevada, petitioner requested appointed counsel to represent him in misdemeanor proceedings at the expense of the State of Nevada, in that he was without means to employ counsel. On June 19, 2000, the Justice of the Peace granted Mr. Hiibel's request and ordered that the Nevada State Public Defender be appointed to represent him at the expense of the State of Nevada. Although not formally entitled "leave to proceed *in forma pauperis*," it would appear that the court granted Mr. Hiibel's request due to his indigency at that time. In accordance with local practice, the Nevada State Public Defender continued to represent Mr. Hiibel through all appeal proceedings

(2)

without any further declaration of indigency. A copy of the Petition and order may be found at Appendix B.

Petitioner's affidavit or declaration in support of this motion is also attached hereto.

DATED this 22 day of July, 2003.

by: _____

JAMES P. LOGAN, Jr.
Counsel of Record
NEVADA STATE PUBLIC DEFENDER
511 East Robinson Street, Suite 1
Carson City, Nevada 89701
(775) 687-4880

Attorney for Petitioner

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Larry Dudley Hiibel, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0	$ N/A	$ 0	$ N/A
Self-employment	$ 500	$ N/A	$ 500	$ N/A
Income from real property (such as rental income)	$ N/A	$ N/A	$ N/A	$ N/A
Interest and dividends	$ N/A	$ N/A	$ N/A	$ N/A
Gifts	$ N/A	$ N/A	$ N/A	$ N/A
Alimony	$ N/A	$ N/A	$ N/A	$ N/A
Child Support	$ N/A	$ N/A	$ N/A	$ N/A
Retirement (such as social security, pensions, annuities, insurance)	$ 312.00	$ N/A	$ 312.00	$ N/A
Disability (such as social security, insurance payments)	$ N/ A	$ N/A	$ N/A	$ N/A
Unemployment payments	$ N/A	$ N/A	$ N/A	$ N/A
Public-assistance (such as welfare)	$ N/A	$ N/A	$ N/A	$ N/A
Other (specify): _____	$ N/A	$ N/A	$ N/A	$ N/A
Total monthly income:	$ 812.00	$ N/A	$ N/A	$ N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	$ N/A
			$
			$

4. How much cash do you and your spouse have? $ 10.00
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A	N/A	$ N/A	$ N/a
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☒ Home
Value 3,000

☒ Other real estate
Value 30,000

☒ Motor Vehicle #1
Year, make & model 1988-GMC truck
Value $500

☒ Motor Vehicle #2
Year, make & model NZA 1990. $500 XXXX XX
Value $500

☐ Other assets
Description N/A
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$ N/A	$ N/A
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
Mary Hiibel	daughter	25
Jude M. Hiibel	grand son	2

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☒ No Is property insurance included? ☐ Yes ☒ No	$ N/A	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 100	$ N/A
Home maintenance (repairs and upkeep)	$ 100	$ N/A
Food	$ 400	$ N/A
Clothing	$ 50	$ N/A
Laundry and dry-cleaning	$ 20	$ 20
Medical and dental expenses	$ 75	$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 50	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ N/A	$ N/A
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ N/A	$ N/A
Life	$ N/A	$ N/A
Health	$ N/A	$ N/A
Motor Vehicle	$ 40	$ N/A
Other: _____	$ N/A	$ N/A
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ N/A	$ N/A
Installment payments		
Motor Vehicle	$ N/A	$ N/A
Credit card(s)	$ N/A	$ N/A
Department store(s)	$ N/A	$ N/A
Other: _____	$ N/A	$ N/A
Alimony, maintenance, and support paid to others	$ N/A	$ N/A
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 1,500	$ N/A
Other (specify): _____	$ N/A	$ N/A
Total monthly expenses:	$ 2,295	$ N/A

MONTHLY EXPENSE FOR CATTLE

Hay	$500
Vaccines	30
Fuel	200
tires	50
fencing	600
tools	100
misc.	50
TOTAL	$1,500/mth

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am indigent. I barely have enough money to pay for necessities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: July 15, 2003, 20__

SUBSCRIBED AND SWORN TO
BY Larry Dudley Hiibel
BEFORE ME THIS 15th DAY
OF July, 2003
Laura D. Lecumberry
NOTARY PUBLIC

Larry Dudley Hiibel
(Signature)

LAURA D. LECUMBERRY
Notary Public - State of Nevada
Appointment Recorded in Humboldt County
No: 99-37847-9 - Expires September 1, 2003

03-5554

No. _____

JUL 22 2003
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

LARRY D. HIIBEL, Petitioner

v.

The SIXTH JUDICIAL DISTRICT COURT of the STATE OF NEVADA, in and for the COUNTY OF HUMBOLDT, and the Honorable Richard A. Wagner, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR WRIT OF CERTIORARI

JAMES P. LOGAN, Jr.
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QUESTION PRESENTED

Do the Fourth and Fifth Amendments to the United States constitution bar the state from compelling people to identify themselves during a police investigation when someone has been seized upon less than probable cause?

PARTIES TO THE PROCEEDING

There are no parties to this matter other than those named in the caption.

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PETITION FOR WRIT OF CERTIORARI

Larry D. Hiibel respectfully seeks certiorari to review the judgment of the Supreme Court of the State of Nevada which effectively affirmed his criminal conviction for resisting a public officer. This conviction was based upon Mr. Hiibel's refusal to identify himself. Mr. Hiibel previously filed a petition for a writ of certiorari in the Supreme Court of the State of Nevada seeking to establish as unconstitutional that portion of Nevada Revised Statute (NRS) 171.123 which requires individuals to identify themselves when they are seized by a police officer on less than probable cause. The Supreme Court of the State of Nevada ruled that the aforementioned statute was constitutional under the Fourth and Fifth Amendments to the United States Constitution.

OPINIONS BELOW

The December 20, 2002, opinion of the Supreme Court of the State of Nevada denying Mr. Hiibel's petition for a writ of certiorari is published at 59 P.2d 1201 (2002). Appendix A. The April 25, 2003, order of the Supreme Court of the State of Nevada denying rehearing is unpublished. Appendix F.

JURISDICTION

The opinion of the Supreme Court of the State of Nevada denying Mr. Hiibel's petition for a writ of certiorari was entered on December 20, 2002. On April 25, 2003, the Supreme Court of the State of Nevada denied Mr. Hiibel's timely petition for rehearing. Remittitur has been stayed pending this application for a writ of certiorari.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2 of the United States Constitution provides, in pertinent part: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, ..."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fourth Amendment to the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ..."

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . ."

NRS 171.123 provides, in pertinent part:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
> . . .
> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not a compelled to answer any other inquiry of any peace officer.

NRS 199.280 provides, in pertinent part:

> 1. A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished: . . .
> 2. Where no dangerous weapon is used in the course of such resistance, obstruction or delay, for a misdemeanor.

STATEMENT OF THE CASE

The Petitioner Larry D. Hiibel, was convicted in the justice court of Humboldt County, State of Nevada, of resisting a public officer in violation of NRS 199.280. The basis for this conviction was that Mr. Hiibel, during a Terry stop, had failed to identify himself to a police officer upon request. See Terry v. Ohio, 392 U.S. 1 (1968). Appendix C.

Mr. Hiibel unsuccessfully appealed this misdemeanor conviction to the district court in Humboldt County. Appendix D. Thereafter, Mr. Hiibel filed a petition for a writ of certiorari in the Supreme Court of the State of Nevada. In that petition, Mr. Hiibel requested that the court declare as unconstitutional that portion of NRS 171.123 which requires the person who is the subject of a Terry stop to identify himself or herself. Appendix G. In a split decision the Supreme Court of the State of Nevada upheld the constitutionality of the statute. Appendix A. Mr. Hiibel then filed a Petition for Rehearing. In that petition Mr. Hiibel claimed that the court should have analyzed the issue utilizing a Fifth Amendment analysis rather than a Fourth Amendment analysis. It was Mr. Hiibel's position in this petition that the court should have utilized a weighing analysis similar to this Court's analysis in California v. Beyers, 402 U.S. 424 (1971). Utilizing this analysis, Mr. Hiibel reasoned that the court

would find the statute unconstitutional. Appendix I. The Petition for Rehearing was denied without discussion. Appendix F.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In response to a call from police dispatch, Humboldt County Sheriff Deputy Lee Dove drove to the scene where a concerned citizen had observed someone striking a female passenger inside a truck. There, Deputy Dove spoke to the concerned citizen and was directed to a parked truck. When Deputy Dove approached the truck he noticed skid marks in the gravel, suggesting the truck had been parked in a sudden and aggressive manner. Deputy Dove saw the petitioner Larry D. Hiibel standing outside the truck and thought he was intoxicated based on his eyes, mannerisms, speech, and odor. Mr. Hiibel's minor daughter was in the passenger side of the truck. When Deputy Dove asked Mr. Hiibel to identify himself, Mr. Hiibel refused. Instead, Mr. Hiibel placed his hands behind his back and challenged the officer to take him to jail. Mr. Hiibel said he would cooperate but was unwilling to provide identification, because he did not believe he had done anything wrong. After eleven requests for identification, to no avail, Deputy Dove arrested Mr. Hiibel.

Mr. Hiibel was charged and found guilty of Resisting a Public Officer, a misdemeanor. Mr. Hiibel unsuccessfully appealed the case to the district court. Appendix A at 2-4.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. SPLIT OF AUTHORITY

There is a split of authority between circuits and among several states regarding the issue presented in this petition.

On three separate occasions the Ninth Circuit Court of Appeals has decided that a person being detained because of an articulable suspicion of criminal activity may refuse to identify himself or herself. Carey v. Nevada Gaming Control Bd., 279 F.3d 873 (9th Cir. 2002); Martinelli v. City of Beaumont, 820 F.3d 1491 (9th Cir. 1987); and Lawson v. Kolender, 658 F.2d 1362 (9th Cir. 1981), affirmed on other grounds Kolender v. Lawson, 461 U.S. 352 (1983). Similarly, in Richardson v. Bonds, 860 F.2d 1427, 1432 (7th Cir. 1988), the court stated that "it was clearly established that a private citizen could not be arrested for failing to identify himself." See also, Moya v. United States, 761 F.2d 322, 325 (7th Cir. 1984) (probable cause not established by failing to present identification to a police officer upon request by a law enforcement officer). The Eleventh Circuit Court of Appeals is in accord. United States v. Brown, 731 F.2d 1491, 1494 (11th Cir. 1984), modified on other grounds 731 F.2d 1505 (11th Cir. 1984) (per curiam). See also, Gaynor v. Rogers, 973 F.2d 1379 (8th Cir. 1992). Finally, the Texas federal district court made a similar ruling in Spring v. Caldwell, 561 F.Supp. 1223, 1229-30 (S.D. Tex. 1981), reversed on other grounds 692 F.2d 994 (5th Cir. 1982).

Several state courts are in accord with the above-referenced federal courts. See People v. DeFillippo, 262 N.W.2d 921 (Mich. 1977) reversed on other grounds, Michigan v. DeFillippo, 443 U.S. 31 (1979); People v. Berck, 300 N.E.2d 411, 414-16 (N.Y. 1973); State v. White, 640 P.2d 1061 (Wash. 1982); Burks v. State, 719 So.2d 29 (Fla.App. 2 Dist. 1998); State v. Hauan, 361 N.W.2d 336 (Iowa Ct.App. 1984).

The Tenth Circuit Court of Appeals seems to be on the opposite side of the issue. See Albright v. Rodriguez, 51 F.3d 1179, 1190 (10th Cir. 1995); Oliver v. Woods, 209 F.3d 1179, 1190 (10th Cir. 2000). State courts which seem to be in accord with this line of authority are State v. Flynn, 285 N.W.2d 710 (Wis. 1979); Jones v. Commonwealth of Virginia, 334 S.E.2d 536 (Va. 1985); People v. Evans, 689 N.E.2d 142 (Ill. 1997). In addition, while not addressing the precise issue presented in this petition, several courts have held the failure to identify oneself to a police officer a criminal act. See, Johnson v. State, 507 S.E.2d 13 (Ga.App. 1998); State v. George, 905 P.2d 626 (Id. 1995); Township of East Brunswick v. Malfitano, 260 A.2d 862 (N.J. App. Div. 1970); State v. Andrews, 934 P.2d 289 (N.M. App. 1997).

It is plainly evident from the above discussion that there is a clear split of authority among the federal circuit courts and among the states which warrants this Court's intervention to resolve the split of authority.

B. IMPORTANT ISSUE

The issue presented in this petition has been considered important enough in the past to come before this Court on two separate occasions. However, this Court found it unnecessary to answer this precise question and resolved both cases on other grounds. Brown v. Texas, 443 U.S. 47 (1979) and Kolender v. Lawson, 461 U.S. 352 (1983). After two decades of the litigation which has produced the split of authority described above it is now time to resolve the issue once and for all.

Although this Court did not resolve the issue presented by this petition, the court has not been silent on the issue.

In Terry v. Ohio, 392 U.S. 1, 34 (1968), Justice White explained in his concurring opinion that "of course, the person stopped is not obligated to answer, . . .

and refusal to answer furnishes no basis for an arrest, although it may alert the officers to the need for continued observation."

In Berkemer v. McCarty, 468 U.S. 420, 439 (1984), while discussing Terry stops, the court stated:

> [T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.' Ibid. (quoting Terry v. Ohio, supra, at 29, 20 L.Ed.2d 889, 88 S.Ct. 1868). Typically, this means that the officer must ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obligated to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.

Emphasis added.

In his concurring opinion in Michigan v. DeFillippo, 443 U.S. 31, 44 (1979), Justice Blackmun stated:

> Furthermore, while a person may be briefly detained against his will on the basis of reasonable suspicion 'while pertinent questions are directed to him . . . the person stopped is not obligated to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest . . . .' Terry v. Ohio, supra, at 34, 20 L.Ed.2d 889, 88 S.Ct. 1868, 44 Ohio Ops.2d 383 (White, J., concurring). In the context of criminal investigation, the privacy interest in remaining silent simply cannot be overcome at the whim of any suspicious police officer. "[W]hile the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.' Davis v. Mississippi, 394 U.S. 721, 727 n.6, 22 L.ed.2d 676, 89 S.Ct. 1394 (1969).

In note 6 in Davis v. Mississippi, 394 U.S. 721, 727 (1969), the court stated:

> The State relies on various statements in our cases which approve general questioning of citizens in the course

> of investigating a crime. See Miranda v. Arizona, 384 U.S. 436, 477-78, 16 L.Ed2d 694, 725, 726, 86 S.Ct. 1602, 10 ALR3d 974 (1966); Culombe v. Connecticut, 367 U.S. 568, 635, 6 L.Ed.2d 1037, 1076, 81 S.Ct. 1860 (concurring opinion) (1961). But these statements merely reiterated the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.

Finally, Justice Brennan, in his concurring opinion in Kolender v. Lawson, 461 U.S. 352, 364, 365 (1983), while he was discussing Terry stops, stated:

> For precisely that reason, the scope of seizures of the person on less than probable cause that Terry permits is strictly circumscribed to limit the degree of intrusion they cause. Terry encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; and, most importantly, the suspect must be free to leave after a short time and to decline to answer the questions put to him.

Emphasis added.

The issue which is the subject of this petition has arisen in civil rights litigation. Courts have dismissed claims based upon this issue as not being "clearly established law". See, Risbridger v. Connelly, 275 F.3d 565 (6th Cir. 2001); Albright v. Rodriguez, 51 F.3d 1531 (10th Cir. 1995). If there is a right to refuse to identify oneself to a police officer, no citizen of this country should spend one minute in jail for exercising that right under the United States Constitution. On the other hand, if there is no such right, no police officer should suffer the unpleasantness of civil litigation for enforcing a law that the officer has sworn to uphold. It is time for the issue to be resolved.

In Nevada the situation is completely untenable. If a police officer arrests someone for refusing to identify himself or herself, that officer is upholding the law as determined by the state's higher court. However, that officer will be sued in federal court and will lose! Police officers should not be forced to put their personal fortune at risk for enforcing a law which they have sworn to uphold. A similar situation is present in those states within the Ninth Circuit which have laws similar to Nevada. It is time to resolve this issue once and for all.

CONCLUSION

As the law now stands in some jurisdictions, a person under a shadow of suspicion, who has not committed any crime, can be approached by the police, do absolutely nothing, and yet be arrested, convicted and incarcerated. This issue goes to the very nature of the kind of society in which we wish to live: it is inimical to a free society that mere silence can lead to imprisonment.

Based upon the foregoing, because there is a split of authority on the matter at hand and the petition raises an important issue present throughout the country, the petition should be granted and the writ issue.

RESPECTFULLY SUBMITTED this 22 day of July, 2003.

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IN THE
SUPREME COURT OF THE UNITED STATES

LARRY D. HIIBEL
Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF, HUMBOLDT AND THE HONORABLE RICHARD A. WAGNER
Respondent,

and

THE STATE OF NEVADA,
Real Party in Interest.

On Petition For Writ of Certiorari
To The Supreme Court of Nevada

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. WHETHER UNDER THE PROTECTIONS OF THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION NRS 171.123(3) VIOLATES AN INDIVIDUAL'S RIGHT OF PRIVACY.

2. WHETHER NRS 171.123(3) COMPELS AN INDIVIDUAL TO BE A WITNESS AGAINST HIMSELF IN VIOLATION OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

OPINIONS AND JUDGMENTS BELOW

Larry D. Hiibel v. Sixth Judicial District Court, 118 Nev. Ad. Op. 88, 59 P.3d 1201 (2002).

JURISDICTION

Pursuant to United States Supreme Court Rules 15.3 and 24.2 Respondent adopts Petitioner's statement regarding jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV

United States Constitution, Amendment V

NRS 171.123

OPPOSITION TO WRIT OF CERTIORARI

I

FACTUAL AND PROCEDURAL BACKGROUND

On May 21, 2000 Humboldt County Deputy Lee Dove (hereinafter referred to as Dove) responded to a call from the Humboldt County Dispatch that an individual had observed a fight between two people who were traveling in a red and silver GMC pickup truck on Grass Valley Road in Humboldt County, Nevada. Deputy Dove drove his patrol vehicle south on Grass Valley Road and stopped his vehicle near Lynx Road. He had a brief conversation with an apparent witness to the fight. This individual's name was Mr. Riddley. (Petitioner's App. C and D)

After obtaining some additional information from Mr. Riddley, Dove continued to drive south on Grass Valley Road. While driving south on Grass Valley Road Dove saw a truck that matched the description given to him by the Humboldt County dispatcher. This truck was pulled off to the side of the road and petitioner, Larry D. Hiibel, (hereinafter referred to as Hiibel) was standing next to the truck. Dove got out of his vehicle and started walking toward Hiibel. As he walked toward Hiibel he noticed a female was sitting inside the cab of the truck. Dove asked Hiibel for identification but Hiibel refused to provide it. Dove continued to ask Hiibel for his identification but each time Hiibel refused to comply. According to the record Dove asked Hiibel to produce his identification eleven (11) times. On one occasion Hiibel asked Dove why he needed to provide his identification. Dove explained that he needed Hiibel's identification because of the reported fight. During this encounter Hiibel even placed his hands behind his back and told Dove to take him to jail. In light of Hiibel's refusal to

provide identification. Dove placed him under arrest for the crime of resisting an officer pursuant to NRS 199.280[1]. (Petitioner's App. C and D)

On December 13, 2001 a misdemeanor trial was held in the Union Township Justice Court in Winnemucca, Nevada. Based on the evidence presented to the court, Hiibel was found guilty of violating NRS 199.280, resisting a police office. Hiibel was fined $250.00 and assessed an administrative fee of $70.00. (Petitioner's App. G) Hiibel appealed this conviction to the Sixth Judicial District Court, State of Nevada. That appeal was denied and Hiibel's conviction was affirmed. Hiibel then filed a Writ of Certiorari with the Nevada Supreme Court. (Petitioner's App. G) On December 20, 2002 the Nevada Supreme Court denied Hiibel's writ of Certiorari. (Petitioner's App. A) On January 7, 2003 Hiibel filed a petition for rehearing. (Petitioner's App. I) On April 25, 2003 the Nevada Supreme Court denied the petition for rehearing. (Petitioner's App. F)

Hiibel filed his Writ of Certiorari with this court on or about July 22, 2003. On August 8, 2003 the State of Nevada through its counsel, Conrad Hafen, submitted a waiver to this court stating that it did not intend to file a response but asked the court to grant Hiibel's Writ of Certiorari because of the jurisdictional conflict between the Ninth Circuit Court of Appeals and the Nevada Supreme Court. However, on August 28, 2003 this Court, through the Office of the Clerk, sent a letter to Mr. Hafen requesting that the State of Nevada file a response to Hiibel's Petition for a Writ of Certiorari on or before September 29, 2003. The court further instructed Mr. Hafen to submit ten (10) typewritten reproduced copies of the response together with proof of service.

[1] A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished:
(2) Where no dangerous weapon is used in the course of such resistance, obstruction or delay, for a misdemeanor.

II

LEGAL ARGUMENT

1. NRS 171.123(3) DOES NOT VIOLATE AN INDIVIDUAL'S FOURTH AMENDMENT RIGHT OF PRIVACY BECAUSE CITIZENS DO NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN THEIR NAME

The Nevada State statute at issue in this case is NRS 171.123(3). This statute states in pertinent part:

> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself but may not be compelled to answer any other inquiry of any peace officer.

NRS 171.123 is the State of Nevada's statutory codification of this court's opinion in Terry v. Ohio, 392 U.S. 1 (1968). *See* State v. Lisenbee, 116 Nev. 1124, 13 P.3d 947 (2000). A prerequisite to detaining an individual pursuant to NRS 171.123(3) is that the officer must first have reasonable suspicion. If an officer believes he has reasonable suspicion that the person has committed, is committing or is about to commit a crime, the officer may detain that person for up to sixty (60) minutes. *See* NRS 171.123(1)(4). Once a person is detained on reasonable suspicion they are considered to be seized under the Fourth Amendment. Davis v. Mississippi, 394 U.S. 721 (1969); Terry v. Ohio, 392 U.S. 1 (1968). This court has recognized that there is a special category for police investigations that require an initial seizure of the person. In Terry v. Ohio, 392 U.S. 1 (1968) this court determined that as a "rubric of police conduct" an officer could seize an individual on less than probable case. *Id.* at 20. This court has also applied a balancing test between the public interest in preventing crime and the individual's right to personal security free from arbitrary interference by law officers.

See United States v. Brignoni-Ponce, 422 U.S. 873, 878-883 (1975); *See Also* Dunaway v. New York, 442 U.S. 200 (1979).

One of the questions put before this court is whether the right of privacy found in the Fourth Amendment of the United States Constitution protects a person from being compelled to provide identification after he is lawfully detained by an officer. The state contends that compelling a lawfully detained person to identify himself is reasonable when balancing the interests of law officers and a person's right of privacy and/or right to be free from arbitrary interference with law officers. Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977). In Katz v. United States, 389 U.S. 347 (1967) Justice Harlan's concurring opinion set forth a two part test when determining if a person has a right of privacy under the Fourth Amendment. Justice Harlan believed that a court should ask first, whether the person has exhibited an actual (subjective) expectation of privacy and second, whether that expectation is one that society is prepared to recognize as reasonable. *Id.* at 361. This court seems to have adopted this test in many subsequent cases dealing with this "right of privacy." Bond v. United States, 529 U.S. 334 (2000).

The first prong of this test asks whether the individual has engaged in any affirmative conduct to ensure that his privacy interests are protected. The record in this case fails to provide an abundance of evidence regarding Hiibel's subjective intentions as it relates to keeping his name private. However, the record does indicate that Hiibel was driving a vehicle at the time he committed the alleged crime of battery/domestic battery. There is nothing in the record to suggest he did not have a valid driver's license. (See Petitioner's App. G) In order to have a driver's license, Hiibel had to provide his true and correct name to the Nevada Department of Motor Vehicles. This was an affirmative act on Hiibel's part to reveal his name

to a governmental agency and not maintain his right of privacy. As a result, it appears that Hiibel engaged in conduct that is contrary to his assertion that his name should be given privacy protection under the Fourth Amendment.

Perhaps the most compelling argument against Hiibel's claim is found in part two of Justice Harlan's test. The state submits that society is not prepared to recognize that a person has a reasonable expectation of privacy in their name when being lawfully detained by an officer. In order to function in our society it is necessary that a person provide their name under a variety of governmental imposed requirements. A person can not obtain a job without first providing identification to their potential employer. This is required because the employer needs to complete paperwork required by the state and federal government as it relates to wage withholding and benefits. Lending institutions governed by governmental rules and regulations require a person to provide identification before a loan can be approved. Individuals can not attend schools, travel the airlines or obtain a credit card without revealing their identification. In addition, individuals who are stopped for traffic violations provide identification to the officer. These are just some examples that illustrate how pervasive the requirement to provide identification has become in our society.

Furthermore, in today's society people recognize and understand how important it is that law enforcement investigate and charge the right person. There is a continuous debate in our criminal justice system over wrongful arrests and convictions and how best to prevent them. One of the best tools law officers have to avoid arresting the wrong person is to obtain the suspected individual's identification. Most people in our society recognize that by providing identification to an officer at the early stages of a legal detention quickens the process of correctly identifying whether the officer is detaining the right person. As a result,

the state submits that society is not prepared to recognize that withholding identification after being lawfully detained by an officer is a reasonable expectation of privacy.

In Wyoming v. Houghton, 526 U.S. 295 (1999) this court stated:

> The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search and seizure under the common law when the amendment was framed. Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree in which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. *Id.* at 299-300 (emphasis added).

It is difficult to determine if, under the common law, requiring an individual to identify himself would be considered a violation of the Fourth Amendment. Clearly the framers of the United States Constitution wanted to protect individuals from unreasonable intrusions into their homes, persons, papers and effects. But query whether giving your name to an officer falls under any of these protected areas. As previously stated, NRS 171.123(3) only requires a lawfully detained person to identify himself. It does not require that he produce a paper or other form of identification. The state suggests that the framers intent in drafting the Fourth Amendment was to protect citizens from the government engaging in intrusive searches of their person or home and seizing their papers and effects without first establishing probable cause to do so. However, identifying yourself is different because it does not involve the searching of a home, the person or seizing the person's papers or effects. As a result, traditional standards of reasonableness should be applied in this case.

The state submits that when you apply traditional standards of reasonableness to the legitimate governmental interest in preventing crime against a person's right of privacy not

reveal his name to an officer, the governmental interest outweighs this de minimis intrusion. Requiring an individual to identify himself is not unreasonable because the state has a compelling interest in preventing crime. By obtaining a lawfully detained person's identification law officers can determine the person's name. This will assist them in matching information from an outstanding warrant or flyers issued from other agencies. They will also be able to determine if the person they are confronting has a violent criminal history and take increased precautionary measures to protect themselves as well as other officers. Again, if we place barriers to an officer's ability to identify the individual they are confronting the investigation may lead to erroneous information. Without a proper investigation those who are innocent might be falsely accused. Those who were guilty might wholly escape prosecution and many crimes would go unsolved. As a result, the security of all would be diminished. Haynes v. Washington, 373 U.S. 503 (1963).

Since it is reasonable to require an individual to identify himself in furtherance of a legitimate governmental interest, Hiibel had no clearly established constitutional right to refuse Dove's lawful request to provide identification. As a result, Hiibel was in violation of NRS 199.280 and could be lawfully arrested. In Oliver v. Woods, 209 F.3d 1179 (2000) the Tenth Circuit Court of Appeals reached the same conclusion. Oliver, a criminal defense attorney, was taking his car to an auto repair shop. In the process of driving his car into the shop he triggered a silent alarm. Law enforcement officers installed the silent alarm to catch individuals who had been dumping illegal oil near the auto shop. An officer approached Oliver and asked for his name and identification. Oliver refused and quoted the Utah statute regarding when an officer can ask for identification. The officer asked for identification again and told Oliver he was not free to leave. Oliver ignored the officer and left in another vehicle

that was there to pick him up. The officer followed Oliver and upon receiving backup stopped Oliver's car. Oliver was told to get out of his car but he refused. After a brief scuffle he was arrested for failing to provide identification.

The prosecutor reviewed the case and determined that no penalty was imposed for violating this statute. The charge was amended to failing to display motor vehicle registration. The justice of the peace dismissed the charge because he determined the officers did not have reasonable suspicion to detain Oliver. Oliver filed a civil lawsuit under 42 U.S.C.A. Section 1983 alleging the officers violated his constitutional rights. The United States District Court for the District of Utah denied the officers' motion for summary judgment on qualified immunity grounds and granted Oliver's motion for summary judgment as to liability.

On appeal, the Tenth Circuit Court of Appeals noted that the Utah statute Oliver was arrested under codified the requirements for an investigative or *Terry* detention. The court reviewed the facts leading up to Oliver's arrest and determined that the officer did have reasonable suspicion to detain him. *Id.* at 1187-8. The court then addressed the issue of whether the officer had probable cause to arrest Oliver when he refused to produce identification. The court cited Adams v. Williams, 407 U.S. 143 (1972) and stated "when an officer is conducting a lawful investigative detention based on reasonable suspicion of criminal activity, the officer may ask for identification and an explanation of the suspect's presence in the area." *Id.* at 1189.

The court ruled that the officer gave Oliver a lawful order when he told him to present identification and remain in the parking lot while he conducted an investigation. When Oliver refused to present identification he refused to perform an act required by a lawful order that was necessary to affect the detention. *Id.* The Tenth Circuit concluded its opinion by holding

that Oliver had no clearly established constitutional right to violate Utah code 76-8-305 which makes it a misdemeanor to interfere with an officer when he is seeking to affect a lawful detention. *Id.* at 1190. *See* United States v. Trimble, 986 F.2d 394 (10th Cir. 1993).

In the case at bar, Deputy Dove was effectuating a detention based on reasonable suspicion. NRS 199.280 prohibits an individual from delaying or obstructing an officer while he is discharging any legal duty. Deputy Dove had reasonable suspicion to investigate a reported crime and therefore was engaged in a legal duty. When petitioner refused to produce identification during the course of the lawful detention he delayed and obstructed Deputy Dove as he discharged his legal duty. As in Oliver, Hiibel has no clearly established constitutional right to violate NRS 171.123(3). Therefore, arresting petitioner for failing to produce identification and other acts amounting to resisting a public officer under NRS 199.280 does not make NRS 171.123(3) unconstitutional under the Fourth Amendment.

Permitting an individual to refuse to identify himself once an officer has reasonable suspicion to detain and investigate a crime carves out a much broader protection than the Fourth Amendment envisions. It tips the scale and forces an officer to make more difficult decisions because he no longer has the ability to gather needed information. NRS 171.123(3) does not give an officer unfettered discretion in stopping individuals and compelling them to produce identification. Delaware v. Prouse, 440 U.S. 648 (1979). The statute requires an officer to have reasonable suspicion before detaining a person for investigative purposes. This protects the person from arbitrary interference of a law officer. However, once an officer establishes reasonable suspicion he should be allowed to fully confirm or dispel those suspicions as quickly as possible. Requiring the detained person to identify himself is a

reasonable means in achieving this goal. As a result, the public interest in crime prevention and effective police work outweighs Hiibel's claimed right of privacy.

2. COMPELLING AN INDIVIDUAL TO PROVIDE IDENTIFICATION AFTER BEING LAWFULLY DETAINED BY AN OFFICER DOES NOT VIOLATE THE PROTECTION SET FORTH IN THE FIFTH AMENDMENT THAT NO PERSON SHALL BE COMPELLED TO BE A WITNESS AGAINST HIMSELF.

The Fifth Amendment of the United States Constitution protects a person from being "compelled in any criminal case to be a witness against himself." The word "witness" in the constitutional text only applies to the category of compelling incriminating communications to those that are "testimonial" in nature. The history and policies underlying the self-incrimination clause support the proposition that this privilege may only be asserted to resist compelled explicit or implicit disclosures of incriminating information. This privilege was created to prevent the type of inquisitorial methods used by ecclesiastical courts and the Star Chamber wherein an individual would be compelled under oath to answer questions designed to uncover uncharged offenses without evidence from another source. *See* Andresen v. Maryland, 427 U.S. 463, 470-471 (1976); 8 Wigmore sec. 2250; *See Also* Doe v. United States, 487 U.S. 201, 212 (1988).

Based on this historical backdrop the state submits to this court that compelling an individual to produce identification after an officer establishes reasonable suspicion does not constitute a violation of the Fifth Amendment. The state contends that Hiibel's name does not have "testimonial" significance. In United States v. Wade, 388 U. S. 218 (1967) defendant was indicted for robbery. Without notice to his attorney, defendant was placed in a lineup and made to wear strips of tape on his face as the robber allegedly had done. Further, defendant was required to repeat the words used by the robber. Defendant was subsequently convicted of robbery and filed a Writ of Certiorari with the United States Supreme Court. This court

granted Certiorari and determined that defendant's Fifth Amendment privilege against self-incrimination was not violated when he was required to speak the same words the robber spoke during the robbery. This court stated that these spoken words did not have any "testimonial significance" because he was not being asked to disclose any knowledge he had about the robbery itself. *Id.* at 222-223.

Applying this court's interpretation of the Fifth Amendment privilege against self-incrimination in Wade to this case it seems clear that stating one's name carries with it no "testimonial significance." When comparing both cases there are some very important distinctions that this court should consider. First, unlike Wade, Hiibel was never formally charged with a crime prior to being asked for identification. Deputy Dove made this request while conducting a temporary detention to investigate a possible crime relating to battery or domestic battery. The state submits that once a person has been charged and is considered to be the only person who committed the crime, the protections provided by the privilege against self-incrimination become much more important. There is a greater interest in making sure the government does not use compulsive means to extract a confession or information that can be used at time of trial. Second, unlike Wade, requiring Hiibel to provide identification did not give the prosecution any material information about the crime itself. Wade was compelled to speak the same words as the robber while eye witnesses listened. This seems to be a greater infringement on the privilege against self-incrimination because it gave the prosecution an important piece of evidence that placed Wade at the scene of the crime. If the witnesses harbored any doubts as to the identity of the perpetrator, hearing the same words and comparing the voices erased these doubts.

In light of United States v. Wade, 388 U.S. 218 (1967), if this court finds that requiring a person who is detained based on reasonable suspicion to provide identification is a violation of the Fifth Amendment privilege against self-incrimination, the court would be engaging in what Justice Holmes stated as "an extravagant extension of the Fifth Amendment." Holt v. United States, 218 U.S. 245 (1910) (compelling a defendant to put on a blouse did not violate the privilege against self-incrimination). It would be unreasonable to label a person's name as "testimonial" when this court has held that other more incriminating evidence does not merit that distinction. For instance, this court has ruled that compelling a person to provide a blood sample does not violated the Fifth Amendment. Schmerber v. California, 384 U.S. 757 (1966). This court has affirmed the compulsion of a handwriting exemplar, recording of a voice or putting on a shirt. Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 91967); Holt v. United States, 218 U.S. 245 (1910). All more intrusive requirements than simply providing a name while being detained for investigative purposes. In addition, these other compulsive means provide information that has far more evidentiary value at time of trial than a name. This court has further held that unless the compulsion brings about a communication that relates either express or implied assertions of fact or belief the Fifth Amendment privilege against self-incrimination will not apply. Pennsylvania v. Muniz, 496 U.S. 582 (1990); United Sates v. Dionisio, 410 U.S. 1 (1973). Applying this standard to the facts in this case, it is clear there is not a violation of the Fifth Amendment.

In Byers v. California, 402 U.S. 424 (1971) this court recognized that when there is a question of a compelled disclosure that has an incriminating potential the judicial scrutiny is invariably a close one. *Id.* at 427. This court also noted that in an organized society many burdens are placed upon it citizens to provide information that may result in some future

prosecution and that the "mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure..." *Id.* at 427-28. The state contends that NRS 171.123(3) and the need for law officers to identify the individual they are lawfully detaining constitutes a "strong policy in favor of disclosure." Providing identification is "essentially a neutral act." *Id.* at 432. Giving it any other greater significance amounts to what Justice Holmes reiterated in United States v. Sullivan, 274 U.S. 259 (1927) as "an extreme if not extravagant application of the Fifth Amendment.

Perhaps the most compelling state court decision on this issue is State v. Flynn, 285 N.W. 2d 710 (1979). In Flynn an officer was investigating a crime and developed reasonable suspicion to detain the defendant. During the detention the officer asked defendant for identification. Defendant refused to provide his identification so the officer took it from him. On appeal the Wisconsin Supreme Court upheld the officer's conduct. The court stated that unless an officer is entitled to at least ascertain the identity of the suspect the right to stop serves no useful purpose at all. The court determined that to allow a suspect to refuse to provide identification would reduce the officers authority granted in Adams v. Williams, 407 U.S. 143 (1972) to a mere fiction. *See* W. LaFave 9.4(g).

The state finds it difficult to understand how the giving of one's name results in "self-incrimination." The request does not require the suspect to "speak to his guilt" and the answer to such a request does not give law enforcement "substantive information." United States v. Wade, 388 U.S. 221 (1967). NRS 171.123(3) did not require Hiibel to explain his whereabouts at a particular time or his conduct prior to being detained by Deputy Dove. This information can only be described as neutral and non-substantive in nature. If a lawfully detained person can not be compelled to provide identification to an officer, then as the court stated in Flynn,

the right to stop a person on reasonable suspicion serves no useful purpose and the officer's authority is a mere fiction.

CONCLUSION

The state submits that this court should grant Hiibel's Petition for Writ of Certiorari. However, after full briefs have been submitted on the Writ of Certiorari, this court should find that NRS 171.123(3) does not violate a person's rights under the Fourth and Fifth Amendments to the United States Constitution.

Dated this 19 day of September, 2003.

Conrad Hafen
Senior Deputy Attorney General

No. 03-5554

IN THE
SUPREME COURT OF THE UNITED STATES

LARRY D. HIIBEL,

Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF, HUMBOLDT AND THE HONORABLE RICHARD A. WAGNER
Respondent,

and

THE STATE OF NEVADA,
Real Party in Interest.

CERTIFICATE OF SERVICE

I, CONRAD HAFEN, one of the attorneys for the Respondent and the Real Party in Interest in the above entitled proceeding, THE SIX JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT AND THE HONORABLE RICHARD A. WAGNER, and THE STATE OF NEVADA, being a member of the Bar of the Supreme Court of the United States, do hereby certify that, on the 19 day of September, 2003, I caused to have copies of the Brief in Opposition to Petition for Writ of Certiorari mailed as noted below in duly addressed envelopes, with first-class postage prepaid, to each

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person below. All of the following parties have been served and this mailing occurred within the time permitted under the Rules of the Supreme Court of the United States.

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No. 03-5554

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IN THE SUPREME COURT OF THE UNITED STATES

LARRY D. HIIBEL, *Petitioner*

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, and THE HONORABLE RICHARD A. WAGNER, DISTRICT JUDGE, *Respondents*, and THE STATE OF NEVADA, *Real Party in Interest.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITIONER'S REPLY MEMORANDUM

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No. 03-5554

IN THE SUPREME COURT OF THE UNITED STATES

LARRY D. HIIBEL, *Petitioner*

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, and THE HONORABLE RICHARD A. WAGNER, DISTRICT JUDGE, *Respondents*, and THE STATE OF NEVADA, *Real Party in Interest*.

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PETITIONER'S REPLY MEMORANDUM

The State of Nevada concedes that certiorari should be granted: "The state submits that this court should grant Hiibel's Petition for Writ of Certiorari." (Brief in Opp., p. 16). The State represents that when it submitted its waiver on August 8, 2003, indicating it did not intend to file a response, it "asked the court to grant Hiibel's Writ of Certiorari because of the jurisdictional conflict between the Ninth Circuit Court of Appeals and the Nevada Supreme Court." (Brief in Opp., p. 4). Although in disagreement on the merits, the parties are thus in agreement that this Court should exercise its jurisdiction to grant the petition for a writ of certiorari and hear this matter on its merits.

Given the conflict of decisions among the state and federal courts; the importance of the federal question presented not just to Mr. Hiibel but to virtually anyone involved in a police encounter; the questionable reasoning of the lower court decision; and the timeliness of the issue presented, petitioner urges this Court to grant his petition and let the writ issue. Petitioner submits, however, that any argument addressed to the merits of the question presented are best presented in briefs on the merits and has thus refrained from addressing those arguments in this reply memorandum.

RESPECTFULLY SUBMITTED this 23 day of September, 2003.

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Supreme Court, U.S.
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THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Humboldt and the Honorable Richard A. Wagner,
Respondents,

and

THE STATE OF NEVADA,
Real Party in Interest.

On Writ of Certiorari to the Supreme Court of Nevada

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 22, 2003
CERTIORARI GRANTED OCTOBER 20, 2003

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
		UNION JUSTICE COURT DOCKET ENTRIES
5/22/2000	—	Citation/Criminal Complaint filed
6/19/2000	—	Defendant arraigned, advised of his rights and appointed Public Defender
9/29/2000	—	Motion to Dismiss domestic battery charge filed and Order dismissing charge filed
11/7/2000	—	Trial
2/13/2001	—	Continued Trial
2/21/2001	—	Findings of Fact and Conclusions of Law filed
3/13/2001	—	Sentencing, Defendant fined $250 plus $70 administrative assessment
3/14/2001	—	Notice of Appeal filed
3/14/2001	—	Record delivered to District Court
6/26/2001	—	Case remanded from District Court to Justice Court
		SIXTH JUDICIAL DISTRICT COURT IN AND FOR HUMBOLDT COUNTY
3/15/2001	—	Receipt of documents from Justice Court
5/4/2001	—	Appellant's Opening Brief filed
5/9/2001	—	Respondent's Answering Brief filed
5/14/2001	—	Appellant's Reply Brief filed
6/18/2001	—	Hearing on appeal
6/26/2001	—	Order affirming conviction and remand to Justice Court filed

DATE	NO.	PROCEEDINGS
12/4/2001	—	Amended Order filed

SUPREME COURT OF THE STATE OF NEVADA

12/4/2001	—	Petition for Writ of Certiorari filed
12/18/2001	—	Supplement to Petition for Writ of Certiorari filed
2/1/2002	—	Answer to Petition for Writ of Certiorari filed
2/6/2002	—	Motion to Supplement Petition filed
2/21/2002	—	Errata filed
3/15/2002	—	Supplement to Answer filed
6/25/2002	—	Oral argument held
7/3/2002	—	Motion to Clarify Oral Argument filed
12/20/2002	—	Authored opinion denying petition filed
1/7/2003	—	Petition for Rehearing filed
3/4/2003	—	Answer to Petition for Rehearing filed
4/25/2003	—	Order Denying Rehearing filed
5/6/2003	—	Motion to Stay Issuance Remittitur filed
5/22/2003	—	Order Staying Issuance of Notice of Lieu of Remittitur filed
10/27/2003	—	Received notice from the United States Supreme Court that Petition for Writ of Certiorari granted.

IN THE JUSTICE COURT OF UNION TOWNSHIP
IN AND FOR THE COUNTY OF HUMBOLDT,
STATE OF NEVADA

[Filed Feb. 21, 2001]

Case No, XX-69056

THE COUNTY OF HUMBOLDT,
Plaintiff,

vs.

LARRY DUDLEY HIIBEL,
Defendant.

FINDING OF FACTS
CONCLUSIONS OF LAW RULING

On December 13th, 2001 at 9:00 a.m. in Union Township Justice Court, a trial in the criminal matter of the County of Humboldt vs. LARRY DUDLY HIIBEL on a misdemeanor complaint of DELAYING AN OFFICER was heard by UNION TOWNSHIP JUSTICE of the PEACE GENE WAMBOLT. The matter was taken under advisement after final arguments.

FINDING OF FACTS

On May 21st, 2000 at 1900 hours, Deputy Dove responded to a report from Humboldt County Dispatch, that a witness saw two people in a RED and SILVER GM pick-up truck involved in a FIGHT or DOMESTIC BATTERY. The report further described the RED and SILVER GMC pick-up truck and it was located on Grass Valley Road just past B. J's. Market. Dove proceeded South on Grass Valley Road and stopped in his patrol car near Lynx Road and had brief conversation and received directions from a witness Mr. Riddley Dove then continued South again on Grass Valley

Road and saw a vehicle matching the description which he was advised of by dispatch and noticed that the pick-up truck had pulled off the road rapidly, because of the skid marks and the position in which it was parked. As Dove stopped his vehicle, a man who was standing next to the pick-up truck started walking towards him and Dove noticed signs of his intoxication. Dove observed a female in the cab of the pick-up truck. Dove asked the male for personal identification and was refused. Dove asked him several more times for identification and when asked, "why"?, replied that he needed his identification because of a reported fight. The man refusing to give his name, placed his hands behind his back and told Dove to take him to jail. Dove asked the man 11 times for his identification and finally told him that if he didn't give any identification he would be arrested for delaying an officer. Dove asked him if he was going to cooperate? The man refused to identify himself and Dove arrested him for RESISTING PUBLIC OFFICER per NRS 199.280 and took him to jail.

CONCLUSIONS OF LAW

NRS 171.123 (3) provides: "The officer may detain any person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer."

In this instant case Dove received a report from dispatch and was responding to a fight or domestic battery. Because of potential seriousness of injury as a result of domestic battery and that the report from dispatch and the eyewitness were confirmed by Dove's observations when he arrived at the scene, it was not beyond his duty to lawfully ask for

identification. Dove's conduct throughout asking for identification was not overbearing (defendant Exhibit A) or harassing. NRS 171.123 (3) states in part, "person so detained SHALL identify himself." (Underlining for emphasis.) The man who refused to identify himself was arrested (delaying an officer) and only then could he be identified as Larry Dudley Hiibel.

NRS 199.280 provides: "A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished."

Dove requested identification 11 times and the individual refused each request. At the initial contact with Hiibel, he was asked only for identification and failure to provide identification obstructed and delayed Dove as a public officer in attempting to discharge his duty and was in violation to NRS 199.280.

"[E]xtent of the governmental interests involved. One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in an appropriate circumstances and in an appropriate manner approach a person for purpose if investigating possibly criminal behavior even though there is no probable cause to make an arrest". *Terry v. Ohio*, 392 US 1, 20 L Ed 2d 889.

RULING

Based on the above FINDINGS OF FACT, CONCLUSIONS OF LAW plus the testimony and evidence received at the trial; I find that Humboldt County Deputy Dove acted properly and lawfully when he asked Larry Dudley Hiibel for identification and subsequently arrested him for refusing and

therefore find Larry Dudley Hiibel GUILTY of DELAYING AN OFFICER and set 13th March 2001 at 11:00 for a Sentencing Hearing.

DATED this 21 day of February, 2001.

/s/ Gene Wambolt
GENE WAMBOLT
Justice of the Peace.

IN THE SIXTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR THE
COUNTY OF HUMBOLDT

[Filed Jun. 26, 2001]

File No. CR 01-4463
Dept. No. 1

LARRY DUDLEY HIIBEL,
Appellant,

vs.

THE COUNTY OF HUMBOLDT,
Respondent.

ORDER

On May 4, 2001 Appellant, through his attorney, filed his brief on appeal. Later, on May 9, 2001 Respondent, through its attorney, filed an answering brief. Thereafter, on May 14, 2001 Appellant filed a reply brief. Later, on June 18, 2001 the Court held a hearing on this matter.

The Court, having reviewed the above documents and listened to the arguments of counsel, finds and concludes as follows:

This case presents a question which does not have settled law either by the United States Supreme Court or the Nevada Supreme Court. The narrow issue of this case is the constitutionality of NRS 171.127 which is the Nevada codification of the United States Supreme Court case of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 1889 (1968). In addition to placing a bright line time restriction of 60 minutes on such detentions, under subsection three of NRS 171.123, it provides the officer may detain such person only to ascertain the identification of such person and the suspicious circumstances surrounding his presence abroad. Any person

further detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer. It is clear that this provision pertains only to those situations in which the peace officer has what is called "articulable or reasonable suspicion."

The United States Supreme Court in the case of *Kolender v. Lawson*, 461 US 352, 75 L.Ed.2d 903, 103 S.Ct. 1855 (1983), ruled that a California statute which required suspects under cases of articulable suspicion to provide "credible and reliable" identification was unconditionally vague on its face because it encouraged arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy this statute.

It is equally clear in the *Kolender* case, supra, that the United States Supreme Court distinguished the California statues from statutes which are known as simply "stop and identify" statutes.

The Nevada Supreme Court has not ruled on the constitutionality of NRS 171.123(2) which is a simple "stop and identify" statute, however, the Ninth Circuit Court of Appeals in the case of *Martinelli v. City of Beaumont*, 820 F.2d 491 (9th Cir. 1987), construed the *Kolender* case as applying to simple "stop and identify" statutes while the Tenth Circuit Court of Appeals in the case of *Albright v. Rodriguez*, 51 F.3d 1531 (l0th Cir. 1995), has found to the contrary. Within the *Albright* case, supra, it indicates that the United States Supreme Court has specifically on two occasions refused to determine when an individual can be arrested for refusing to identify himself in the context of a lawful investigatory stop. The Tenth Circuit Court of Appeals then cited the case of *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), as well as the *Kolender* case, supra. Within the *Albright* opinion it cites various other circuits who are at odds with the *Martinelli* case of the Ninth Circuit. It can then be concluded that this specific issue

before this Court is not settled law in either the State of Nevada or by the United States Supreme Court. It is, therefore, the duty of this Court to apply the best reasoned opinions to the facts of the particular case before the Court.

It is the opinion of this Court that even without determining the constitutionality issue as to whether NRS 171.123(2) is valid or invalid on its face, that there was sufficient evidence under the totality of the circumstances of this case that the justice court could and did correctly conclude that the Appellant resisted or delayed officer Lee Dove, a deputy sheriff of the Humboldt County sheriff's Department on May 21, 2000 in Humboldt County, Nevada.

The particular facts of this case which give rise to this Court's determination in this matter are based upon the trial transcript before the justice of the peace, Honorable Gene Wambolt, on November 7, 2001 and February 13, 2001. It is also based upon the evidence consisting of a video tape of the entire incident which was also viewed by the justice of the peace. The pertinent facts of this case which relate to this Court's conclusions are as follows:

At approximately 7:00 p.m. on May 21, 2000 Deputy Dove was advised by his dispatcher that a reporting party had observed an individual hitting a female subject in a red and silver vehicle on the Grass Valley Road south of Winnemucca. On the way to the incident, the officer stopped briefly to talk to the reporting party whose last name was Ridley who then pointed further down the road to the vehicle in which he had seen the battery taking place. A short distance down the road the officer located the red and silver G.M.C. pickup truck which had been pointed out to him by the reporting party, and as he pulled up, he noticed the vehicle which appeared to have been pulled over in a fast, aggressive manner as there were skid marks in the gravel where it stopped. The vehicle was not parked in a normal fashion as it appeared to the officer that it had been pulled off to the side

of the road rapidly. The Appellant was outside the truck, and the officer immediately observed that the Appellant was showing signs of alcohol consumption, and the officer believed he was probably intoxicated based on his eyes, his mannerisms, his speech and the odor that was coming from the Appellant.

The officer was able to determine that there was a female person in the vehicle. As the officer approached the Appellant, he told him that he had received a report that they had been fighting and asked the Appellant to identify himself. The Appellant was in an agitated condition and was determined to tell the officer that he was parked legally off from the roadway.

At one point from the video tape, it is clear that the officer, in repeatedly asking the Appellant for his identification, is attempting to protect the Appellant from stepping out onto the highway into traffic; and as the officer attempts by touching the Appellant on the shoulder to move him to a safer location, the Appellant pulls away in anger and is resisting and delaying the officer in carrying out his pressing duty of determining whether a battery and possibly a domestic battery has just taken place. It is a reasonable and necessary order that the officer request the Appellant to identify himself at that time.

On numerous occasions the Appellant placed his hands together, telling the officer to arrest him and take him to jail. When the officer was simply trying to conduct his investigation, which at such point not only included a possible battery but also a possible drunk driving offense, it is clear in addition to the facts found by the justice of the peace that the Appellant resisted and/or delayed the officer, and that there were other actions and behavior of the Appellant over and above simply failing to identify himself which constituted delaying and obstructing the officer in his lawful investigation.

The video tape illustrates that the Appellant resisted and obstructed the officer when he was trying to remove the Appellant from the roadway.

The officer directed the Appellant out of traffic for his own safety in order to safely conduct the investigation.

Also, the officer certainly had reason to believe that Appellant had been drinking and driving.

These facts, together with those specifically found by the justice of the peace, firmly establish that the officer had a right to require identification from the Appellant, and that the Appellant by his refusal to identify himself as well as his other contact at the scene, delayed and obstructed the officer in conducting his important and pressing investigation of a possibly battery and/or domestic violence.

It is also clear that the officer had at least articulable suspicion regarding drunk driving in this matter, which absolutely required the identification of the Appellant.

This Court commends and upholds the findings of fact and conclusions of law of the justice of the peace. His order is accurate, articulate, and precise, and this Court affirms the order of the justice of the peace.

This Court in ultimately deciding this case believes that it must do a balancing of the right to protect the public interest as opposed to an individual's constitutional right to remain silent. Justice Stewart summarized this issue in his concurring opinion in *Leary v. United States*, (1969), supra, 395 U.S. 6, at page 54 [23 L. Ed. 2d 57, at page 92]. He stated:

> ". . . I have before now expressed my conviction that the Fifth Amendment guarantee against compulsory self-incrimination was originally intended to do no more than confer a *testimonial privilege in a judicial proceeding*. But the Court through the years has drifted far from that mooring; the *Marchetti* and *Grosso* cases are simply the

most recent in a long line of decisions marking the extent of the drift. Perhaps some day the Court will consider a fundamental re-examination of its decisions in this area, in the light of the original constitutional meaning. Until that day comes, it seems to me that the authoritative weight of precedent permits no escape from the conclusion reached by the Court in this case." (Fns. omitted.) (Emphasis added.)

In determining the issue before the Court today and applying this balancing test, the Court has to balance the public interest in requiring identify of a person who is a suspect in a battery or domestic violence case and a possible DUI suspect to be required to identify himself as opposed to that individual's right to remain silent. This Court must note that with both domestic battery and DUI the identify of the suspect may be crucial to determine not only for the officer's safety but also for the protection of possible victims. This is particularly so if the suspect has previous convictions for domestic battery or DUI.

IT IS HEREBY ORDERED that this matter be remanded to the Justice Court for further proceedings in affirming the findings of the Justice Court.

IT IS SO ORDERED.

DATED this 25th day of June, 2001.

/s/ Richard A. Wagner
RICHARD A. WAGNER
District Judge

[CERTIFICATE OF SERVICE OMITTED]

IN THE SIXTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA IN AND FOR THE
COUNTY OF HUMBOLDT

Case No. CR 01-4463
Dept. No. 1

LARRY D. HIIBEL,
Appellant,

vs.

THE COUNTY OF HUMBOLDT,
Respondent.

AMENDED ORDER

In this Court's order filed June 26, 2001 the Court indicated that it would consider the constitutionality of NRS 171.127. Lines 25-26, pg.1 of Order filed June 26, 2001. This Court finds that the statute number has been misstated. The actual statute the Court considered the constitutionality of is NRS 171.123.

THEREFORE, IT IS HEREBY ORDERED, that the order filed June 26, 2001 is amended to refer to the constitutionality of NRS 171.123.

IT IS SO ORDERED dated this 3rd day of December, 2001.

/s/ Richard A. Wagner
RICHARD A. WAGNER
District Court Judge

IN THE SUPREME COURT OF THE
STATE OF NEVADA

[Filed Dec. 20, 2002]

No. 38876

LARRY D. HIIBEL,

Petitioner,

vs.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Humboldt, and the Honorable Richard A. Wagner, District Judge,

Respondents,

and

THE STATE OF NEVADA,

Real Party in Interest.

OPINION

By the Court, YOUNG, C.J.:

The pertinent issue before us is whether NRS 171.123(3), which requires a person stopped under reasonable suspicion by a police officer to identify himself or herself, violates the Fourth Amendment of the United States Constitution. We conclude NRS 171.123(3) does not violate the Fourth Amendment because it strikes a balance between constitutional protections of privacy and the need to protect police officers and the public. Therefore, Hiibel's petition for a writ of certiorari is denied.

In pertinent part, NRS 171.123 provides:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
>
> . . . .
>
> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.
>
> 4. A person may not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes.

In response to a call from police dispatch, Humboldt County Sheriff's Deputy Lee Dove drove to the scene where a concerned citizen had observed someone striking a female passenger inside a truck. There, Dove spoke to the concerned citizen and was directed to a parked truck. When Dove approached the truck, he noticed skid marks in the gravel, suggesting the truck had been parked in a sudden and aggressive manner. Dove saw Larry D. Hiibel standing outside the truck and thought he was intoxicated based on his eyes, mannerisms, speech, and odor. Hiibel's minor daughter was in the passenger side of the truck. When Dove asked Hiibel to identify himself, Hiibel refused. Instead, Hiibel placed his hands behind his back and challenged the officer to take him to jail.

Hiibel said he would cooperate but was unwilling to provide identification, because he did not believe he had done anything wrong. After eleven requests for identification, to no avail, Dove arrested Hiibel. Dove described the situation as follows:

> [D]uring my conversation with Mr. Hiibel, there was a point where he became somewhat agressive [sic].

> I felt based on me not being able to find out who he was, to identify him, I didn't know if he was wanted or what is [sic] situation was, I [w]asn't able to determine what was going on crimewise in the vehicle, based on that I felt he was intoxicated, and how he was becoming aggressive and moody, I went ahead and put him in handcuffs so I could secure him for my safety, and put him in my patrol vehicle.

Hiibel was charged and found guilty of resisting a public officer, in violation of NRS 199.280.[1] The justice of the peace in Humboldt County determined that "[Hiibel] was asked only for identification and failure to provide identification obstructed, and delayed Dove as a public officer in attempting to discharge his duty."

On appeal, the district court held it was "reasonable and necessary" for Dove to request identification from Hiibel and affirmed Hiibel's conviction. Evidence "over and above simply failing to identify himself" was found to support Hiibel's arrest and conviction, which included Dove's suspicion that Hiibel engaged in driving under the influence. The district court balanced the public's interest in requiring, Hiibel to identify himself against Hiibel's Fifth Amendment

---

[1] NRS 199.280 states:

> A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished:
>
> 1. Where a dangerous weapon is used in the course of such resistance, obstruction or delay, for a category D felony as provided in NRS 193.130.
>
> 2. Where no dangerous weapon is used in the course of such resistance, obstruction or delay, for a misdemeanor.

Hiibel was also arrested for the misdemeanor charge of domestic battery. This charge was dismissed at the State's request, prior to trial.

right to remain silent. The district court determined it was crucial for the safety of an officer and possible victims to know the identity of a person suspected of battery, domestic violence, and driving under the influence.

We conclude this case is properly before this court pursuant to NRS 34.020(3), because the constitutionality of NRS 171.123(3) presents an issue of first impression. Accordingly, we will address the merits of Hiibel's constitutional challenge to NRS 171.123(3).

Fundamental to a democratic society is the ability to wander freely[2] and anonymously, if we so choose, without being, compelled to divulge information to the government about who we are or what we are doing.[3] This "right to be let alone"[4]—to simply live in privacy—is a right protected by the Fourth Amendment and undoubtedly sacred to us all.[5]

Yet, this right to privacy is not absolute.[6] Like all freedoms we enjoy, it includes both limitations and responsibilities. One such limitation to the right of privacy is reasonableness. The Fourth Amendment only protects against "unreasonable" invasions of privacy, or searches and seizures, by the government.[7]

---

[2] *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

[3] *Brown v. Texas*, 443 U.S. 47, 52-53 (1979).

[4] *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 468 (1952) (Douglas, J., dissenting).

[5] *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citing *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

[6] *Id.*

[7] *Id.* (citing *Elkins v. United States*, 364 U.S. 206, 222 (1960)).

The United States Supreme Court has twice expressly refused to address whether a person reasonably suspected of engaging in criminal behavior may be required to identify himself or herself.[8] Therefore, the issue is unresolved.[9]

There is a split of authority among the federal circuit courts of appeals on this issue.[10] In *Oliver v. Woods*,[11] the Tenth Circuit Court of Appeals upheld a Utah statute that requires individuals to produce identification to an officer during an investigatory stop. However, in *Carey v. Nevada Gaming Control Board*,[12] the Ninth Circuit Court of Appeals held that NRS 171.123(3) violates the Fourth Amendment because "'the serious intrusion on personal security outweighs the mere possibility that identification [might] provide a link

[8] *Brown*, 443 U.S. at 53 n.3 ("We need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements."); *Kolender v. Lawson*, 461 U.S. 352, 361-62 n.10 (1983) (holding that a California statute requiring an individual who loitered or wandered the streets to produce "credible and reliable" identification to an officer upon request of a police officer was unconstitutional on vagueness grounds, but refusing to consider whether the statute violated the Fourth Amendment).

[9] *Albright v. Rodriguez*, 51 F.3d 1531, 1537-38 (10th Cir. 1995); *Gainor v. Rogers*, 973 F.2d 1379; 1386 n.10, 1389 (8th Cir. 1992) (noting that Supreme Court has not determined whether an officer may arrest an individual for refusing to identify himself or herself during an investigative stop); *Tom v. Voida*, 963 F.2d 952, 959 n.8 (7th Cir. 1992) (observing that whether individuals may refuse to answer questions asked by an officer during an investigative stop is a question unanswered by the Supreme Court).

[10] *Compare Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873, 881 (9th Cir. 2002), and *Martinelli v. City of Beaumont*, 820 F.2d 1491, 1494 (9th Cir. 1987), *with Oliver v. Woods*, 209 F.3d 1179, 1190 (10th Cir. 2000), and *Albright*, 51 F.3d at 1537.

[11] 209 F.3d at 1190.

[12] 279 F.3d 873.

leading to arrest.'"[13] We find the reasoning in Carey to be unpersuasive. Given the conflicting authority, we believe an independent analysis of the constitutionality of NRS 171.123(3) is warranted.

Traditionally, in resolving issues implicating the Fourth Amendment right to privacy, the following touchstone question has been asked: Is the invasion of privacy reasonable?[14] Reasonableness is determined by balancing "'the public interest and the individual's right to personal. security free from arbitrary interference by law officers.'"[15] Considerations involve the "weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[16] A primary concern is "to assure that an individual's reasonable expectation of privacy is. not subject to arbitrary invasions solely at the unfettered discretion of officers in the field."[17]

Balancing these interests, we conclude that any intrusion on privacy caused by NRS 171.123(3) is outweighed by the benefits to officers and community safety. The public interest in requiring individuals to identify themselves to officers when a reasonable suspicion exists is overwhelming. The United States Supreme Court has recognized that "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed

[13] *Id.* at 880 (quoting *Lawson v. Kolender*, 658 F.2d 1362, 1366-67 (9th Cir. 1981), *affd*, 461 U.S. 352 (1983)).

[14] *Terry*, 392 U.S. at 9.

[15] *Brown*, 443 U.S. at 50 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977)).

[16] *Id.* at 50-51 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)).

[17] *Id.* at 51 (citing *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)).

in the line of duty, and thousands more are wounded."[18] The most dangerous time for an officer may be during an investigative stop—when a suspect is approached and questioned.

Judicial notice is taken that in the year 2000, fifty-one officers were murdered in the line of duty.[19] These homicides occurred as follows: thirteen during traffic stops/pursuits, twelve during arrest situations, ten during ambushes, eight during responses to disturbance calls, six during investigations of suspicious persons, and two during prisoner transport.[20] Of the suspects who committed these killings, twenty had been previously arrested for crimes of violence, nine had previously assaulted a police officer, and twelve were on probation or parole.[21] Moreover, 15,915 officers were assaulted that year.[22] If the officers referenced in these statistics had known the identity and history of their attackers prior to being assaulted or killed, perhaps some of these incidents could have been prevented.

Knowing the identity of a suspect allows officers to more accurately evaluate and predict potential dangers that may arise during an investigative stop. It follows that an officer "making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspeet."[23] For example, the suspect may be a former felon or

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[18] *Terry*, 392 U.S. at 23.

[19] Federal Bureau of Investigation, U.S. Dep't of Justice, *Crime in the United States 2000*, at 291 (2001).

[20] Federal Bureau of Investigation, U.S. Dep't of Justice, *Law Enforcement Officers Killed and Assaulted, 2000*, at 28 (2001), *at* http://www.fbi.gov/ucr/killed/00leoka.pdf (last visited Nov. 12, 2002) (this document was discontinued in print after 1999 and is now only available on the Internet as referenced above).

[21] *Id.* at 4.

[22] *Id.* at 75.

[23] *Adams v. Williams*, 407 U.S. 143, 146 (1972).

wanted for an outstanding arrest warrant. Such persons pose a heightened risk of danger to officers and the public during investigatory encounters.

Additionally, if suspects are not legally required to identify themselves, what could an officer do if a suspicious person were loitering outside a daycare center or school? Perhaps that person is a sex offender. How are officers to enforce restraining orders? Or, how are officers to enforce curfew laws for minors without a requirement to produce identification? In these situations, it is the observable conduct that creates a reasonable suspicion, but it is the requirement to produce identification that enables an officer to determine whether the suspect is breaking the law.

Most importantly, we are at war against enemies who operate with concealed identities and the dangers we face as a nation are unparalleled. Terrorism is "changing the way we live and the way we act and the way we think."[24] During the recent past, this country suffered the tragic deaths of more than 3,000 unsuspecting men, women, and children at the hands of terrorists; seventeen innocent people in six different states were randomly gunned down by snipers; and our citizens have suffered illness and death from exposure to mail contaminated with Anthrax. We have also seen high school students transport guns to school and randomly gun down their fellow classmates and teachers. It cannot be stressed enough: "This is a different kind of war that requires a different type of approach and a different type of mentality."[25] To deny officers the ability to request identification

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[24] Interview by Tony Snow with Senator Tom Daeschle, United States Senate, Washington, D.C. (Oct. 21, 2002), http://www.foxnews.com/story/0,2933,66236,00.html.

[25] President George W. Bush, Address During a News Conference (Oct. 11, 2001), http://www.cnn.com/2001/US/10/11/gen.bush.transcript/index.html.

from suspicious persons creates a situation where an officer could approach a wanted terrorist or sniper but be unable to identify him or her if the person's behavior does not rise to the level of probable cause necessary for an arrest.

Contrary to the dissent's opinion, requiring a suspect to reveal his name is not an abrogation of the Bill of Rights. "Bills of rights give assurance to the individual of the preservation of his liberty. They do not define the liberty they promise."[26] Furthermore, it has been recognized since the early development of common law that "[a]ll rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."[27] The point of requiring a suspect to provide identification during a lawful investigatory stop has been reached.

The requirements of NRS 171.123(3) are also reasonable and involve a minimal invasion of personal privacy.[28] Reasonable people do not expect their identities—their names to be withheld from officers. Rather, we reveal our names in a variety of situations every day without much consideration. For instance, it is merely polite manners to introduce ourselves when meeting a new acquaintance. A person's name is given out on business cards, credit cards, checks, and driver's licenses, to name a few more instances. In addition, everyone is required to reveal government issued identification to airport officials and are subject to random

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[26] Benjamin N. Cardozo, *The Paradoxes of Legal Science* 97 (1928).

[27] *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

[28] *Adams*, 407 U.S. at 146 ("A brief stop of a suspicious individual, in order to determine his identity . . . may be most reasonable in light of the facts known to the officer at the time.") (citing *Terry*, 392 U.S. at 21-22).

searches before proceeding to flight gates. Asking a suspect to state his or her name when an officer has an articulable suspicion is nominal in comparison.

To hold that a name, which is neutral and non-incriminating information, is somehow an invasion of privacy is untenable. Such an invasion is minimal at best. The suspect is not required to provide private details about his background, but merely to state his name to an officer when reasonable suspicion exists. The Supreme Court held it reasonable for officers to pat down and frisk a person during an investigative stop.[29] As the Court recognized in *Terry v. Ohio*, "it would be unreasonable to require that police officers take unnecessary risks in the performance of their duties."[30] Requiring identification is far less intrusive than conducting a pat down search of one's physical person.

Here, Hiibel was suspected of domestic violence against his minor daughter and driving under the influence of alcohol. Based on skid marks in the gravel, it appeared that Hiibel parked his truck in a quick and aggressive manner. Hiibel refused eleven requests by officers to identify himself. Instead, Hiibel placed his hands behind his back and challenged the deputy to take him to jail. An ordinary person would conclude it was Hiibel who was unreasonable, not the law.

Finally, NRS 171.123(3) is narrowly written. It applies only in situations where an officer has an articulable suspicion that a person is engaged in criminal behavior. "[C]ommon sense often makes good law," once wrote United States Supreme Court Justice William O. Douglas.[31] Requiring a person reasonably suspected of committing a

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[29] *Terry*, 392 U.S. at 24.

[30] *Id.* at 23.

[31] *Peak v. United States*, 353 U.S. 43, 46 (1957).

crime to identify himself or herself to law enforcement officers during a brief, investigatory stop is a commonsense requirement necessary to protect both the public and law enforcement officers. It follows that NRS 171.123(3) is good law consistent with the Fourth Amendment.[32]

/s/ Young, C.J.
YOUNG

We concur:

/s/ Leavitt, J.
LEAVITT

/s/ Becker, J.
BECKER

[32] The dissent, as dramatically worded as it is, does not refute this position.

MAUPIN, J., concurring:

I join in the result reached by the majority, stressing again that NRS 171.123 is narrowly written, and that its requirement that persons reasonably suspected of criminal misconduct be required to identify themselves to police during brief investigatory stops is a commonsense requirement for the protection of the public and law enforcement officers.

I write separately to note that the majority has not somehow overreacted to the dangers presented by the war against domestic and international terrorism. Our decision today is truly related to the ability of police to properly and safely deal with persons reasonably suspected of criminal misconduct, here, domestic violence and driving under the influence of alcohol.

Notwithstanding the sentiments voiced by my dissenting colleagues, NRS 171.123, as stated by Young, C.J., in the majority opinion, "is good law consistent with the Fourth Amendment."

/s/ Maupin, J.
MAUPIN

AGOSTI, J., with whom SHEARING and ROSE, JJ., agree, dissenting:

As the majority aptly states, the right to wander freely and anonymously, if we so choose, is a fundamental right of privacy in a democratic society. However, the majority promptly abandons this fundamental right by requiring "suspicious" citizens to identify themselves to law enforcement officers upon request, or face the prospect of arrest. I dissent from the majority's holding that the identification portion of NRS 171.123 is constitutional.

It is well-established that police officers may stop a person when reasonable suspicion exists that that person is engaged in illegal activity.[1] However, it is equally well-established that detaining a person and requiring him to identify himself constitutes "a seizure of his person subject to the requirements of the Fourth Amendment."[2] In light of these constitutional requirements, the United States Supreme Court has stated that although the officers may question the person, the detainee need not answer any questions.[3] Furthermore, unless the detainee volunteers answers and those answers supply the officer with probable cause to arrest, the detainee must be released.[4]

The Fourth Amendment requires that governmental searches and seizures be reasonable. Reasonableness is determined by "a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the

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[1] *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968); *see also State v. Lisenbee*, 116 Nev. 1124, 1127, 13 P.3d 947, 949 (2000).

[2] *Brown v. Texas*, 443 U.S. 47, 50 (1979).

[3] *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984).

[4] *Id.* at 439-40; *see Kolender v. Lawson*, 461 U.S. 352, 360 n.9 (1983).

interference with individual liberty."[5] A court's primary concern in weighing these interests is to assure "that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers."[6]

Anonymity is encompassed within the expectation of privacy, a civil liberty that is protected during a *Terry* stop. The majority now carves away at that individual liberty by saying that a detainee must surrender his or her identity to the police.

I agree with the Ninth Circuit Court of Appeals' reasoning on the issue of whether a person may be arrested for refusing to identify himself during a *Terry* stop.[7] In *Martinelli v. City of Beaumont*,[8] a woman was arrested for delaying a lawful police investigation by refusing to identify herself during a *Terry*, investigation.[9] The court held that allowing the police officers to arrest the woman for failing to identify herself in effect allowed the officers to "'bootstrap the authority to arrest on less than probable cause.'"[10] The court determined that the woman's interest in her personal security outweighed the "'mere possibility that identification may provide a link leading to arrest.'"[11]

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[5] *Brown*, 443 U.S. at 50-51.

[6] *Id.* at 51.

[7] Although the United States Supreme Court has not yet addressed this issue and there is a split of federal authority, I find the Ninth Circuit's approach to be the more lucid one.

[8] 820 F.2d 1491 (9th Cir. 1987).

[9] *Id.* at 1492.

[10] *Id.* at 1494 (quoting *Lawson v. Kolender*, 658 F.2d 1362, 1366 (9th Cir. 1981), *affd*, 461 U.S. 352 (1983)).

[11] *Id.* (quoting *Lawson*, 658 F.2d at 1366-67).

More directly on point, the Ninth Circuit in *Carey v. Nevada Gaming Control Board*[12] addressed the constitutionality of NRS 171.123(3), the very statute at issue here. In *Carey*, a casino patron brought a claim under 42 U.S.C. § 1983 against a Nevada Gaming Control Board agent for violating his Fourth, Fifth and Fourteenth Amendment rights.[13] The agent was called to a hotel to investigate Carey and another man, who were both suspected by hotel employees of cheating.[14] The agent caused the men to be detained, identified himself, indicated he was investigating gaming law violations, read them their *Miranda* rights and conducted a pat-down search of both detainees.[15] During the *Terry* investigation, the agent determined there was no probable cause to arrest the men for gaming violations.[16] However, when the agent asked the men to identify themselves, Carey refused, and he was arrested pursuant to NRS 171.123(3) and NRS 197.190.[17] On appeal, the Ninth Circuit noted that the agent had reasonable suspicion to conduct a *Terry* stop, and also probable cause to arrest Carey under NRS 171.123(3) and NRS 197.190 once Carey refused to identify himself. However, the court concluded that NRS 171.123(3) and NRS 197.190, as applied to Carey, violated the Fourth Amendment because the United States Supreme Court "has consistently recognized that a person detained pursuant to *Terry* "'is not obliged to answer'"" questions posed by law enforcement officers.[18] The court determined

[12] 279 F.3d 873 (9th Cir. 2002).

[13] *Id.* at 876.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 876, 879-80.

[18] *Id.* at 881-82 (quoting *Dunaway v. New York*, 442 U.S. 200, 211 n.12 (1979) (quoting *Terry v. Ohio*, 392 U.S. 1, 34 (1968))).

that Carey's interest in his personal security outweighed any potential link leading to arrest that could be gleaned from his identity, particularly because Carey's name "was not relevant to determining whether Carey had cheated."[19]

Despite the above authority, the majority erroneously affirms Hiibel's conviction by reflexively, reasoning that the public interest in police and public safety outweighs Hiibel's interest in refusing to identify himself. I am not persuaded. And I am uneasy about the reasons given by the majority in justifying its holding.

The majority concludes that the governmental interest in police safety outweighs an individual's interest in his right to keep private his identity. The majority relies upon FBI statistics about police fatalities and assaults to support its argument. However, it does not provide any evidence that an officer, by knowing a person's identity, is better protected from potential violence. In *Terry*, the United States Supreme Court addressed the issue of officer safety by carving out an exception to the Fourth Amendment to allow a police officer to make certain that the person being detained "is not armed with a weapon that could unexpectedly and fatally be used against him"[20] when the officer reasonably believes "he is dealing with an armed and dangerous individual."[21] The purpose of such a search is to ensure the detainee is not armed with a weapon that could be immediately used against a police officer, not to ensure against a detainee's propensity for violence based upon a prior record of criminal behavior.

It is well known that within the context of a *Terry* stop an officer's authority to search is limited to a pat-down to detect weapons. The officer may investigate a hard object because it

[19] *Id.* at 880.

[20] *Terry*, 392 U.S. at 23.

[21] *Id.* at 27.

might be a gun. An officer may not investigate a soft object he detects, even though it might be drugs. Similarly, an officer may not detect a wallet and remove it for search. With today's majority decision, the officer can now, figuratively, reach in, grab the wallet and pull out the detainee's identification. So much for our right to be left alone or as the majority says—to wander freely and anonymously of we choose.

The majority avoids the fact that knowing a suspect's identity does not alleviate any threat of immediate danger by arguing that a reasonable person cannot expect to withhold his identity from police officers, as we reveal our names to different people everyday. What the majority fails to recognize, however, is that when we give our names to new acquaintances, business associates and shop owners, we do so voluntarily, out of friendship or to complete a transaction. With the heightened security at airports, for example, passengers are required to provide picture identification. But non-passengers are free to wander that portion of the airport that is unsecured without showing an ID. Purchasing an airline ticket is a business transaction, and the airlines may condition the sale on knowing who is the purchaser. In contrast, being forced to identify oneself to a police officer or else face arrest is government coercion precisely the type of governmental intrusion that the Fourth Amendment was designed to prevent. Furthermore, it is not necessary to have one's name on a credit card or checkbook in order to effect a purchase. A dedicated libertarian, for example, might deliberately eschew financial institutions, credit cards and checkbooks, engaging solely in cash transactions, in order to jealously protect his individual rights, especially his right to be anonymous, to be left alone, to wander freely.

Finally, the majority also makes an emotional appeal based upon fear and speculation by arguing that the police would be powerless to protect innocent children from sex offenders, to

enforce restraining orders, and to enforce curfews for minors. What the majority fails to recognize is that it is the observable conduct, not the identity, of a person, upon which an officer must legally rely when investigating crimes and enforcing the law.

The majority further appeals to the public's fear during this time of war "against an enemy who operates with a concealed identity." Now is precisely the time when our duty to vigilantly guard the rights enumerated in the Constitution becomes most important. To ease our guard now, in the wake of fear of unknown perpetrators who may still seek to harm the United States and its people, would sound the call of retreat and begin the erosion of civil liberties. The court must not be blinded by fear. I am reminded of a statement by Justice Felix Frankfurter, so aptly quoted by Chief Justice Young, the majority's author, in another search and seizure case involving individual liberties protected by the Fourth Amendment:

> "[W]e are in danger of forgetting that the Bill of Rights reflects experience with police excesses. It is not only under Nazi rule that police excesses are inimical to freedom. It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end." [22]

The majority, by its decision today, has allowed the first layer of our civil liberties to be whittled away. The holding weakens the democratic principles upon which this great nation was founded. The undermining of that foundation is a

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[22] *Barrios-Lomeli v. State*, 114 Nev. 779, 782, 961 P.2d 750, 752 (1998) (quoting *Davis v. United States*, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting)).

harm more devastating to our country and to this State than any physical harm a terrorist could possibly inflict. "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . liberties . . . which make[ ] the defense of the Nation worthwhile." [23] Our nation is besieged. The terrorist threat has shaken our complacency. Our way of life is threatened as never before. At this time, this extraordinary time, the true test of our national courage is not our necessary and steadfast resolve to defend ourselves against terrorist activity. The true test is our necessary and steadfast resolve to protect and safeguard the rights and principles upon which our nation was founded, our constitution and our personal liberties. I dissent from the majority's retreat from this challenge.

/s/ Agosti, J.
AGOSTI

We concur:

/s/ Shearing, J.
SHEARING

/s/ Rose, J.
ROSE

[23] *United States v. Robel*, 389 U.S. 258, 264 (1967).

IN THE SUPREME COURT OF THE
STATE OF NEVADA

[Filed Apr. 25, 2003]

No. 38876

LARRY D. HIIBEL,
Petitioner,

vs.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for the County of Humboldt, and the Honorable Richard A. Wagner, District Judge,
Respondents,

and

THE STATE OF NEVADA,
Real Party in Interest.

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.[1]

/s/ Shearing, J.
SHEARING

/s/ Leavitt, J.
LEAVITT

/s/ Becker, J.
BECKER

/s/ Maupin, J.
MAUPIN

[1] The Honorable Mark Gibbons, Justice, did not participate in the decision of this matter.

AGOSTI, C.J., and ROSE, J., dissenting:

We would grant rehearing.

/s/ Agosti, C.J.
AGOSTI

/s/ Rose, J.
ROSE

cc: Hon. Richard Wagner, District Judge
State Public Defender/Carson City
Attorney General/Carson City
Humboldt County District Attorney
Humboldt County Clerk

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LARRY D. HIIBEL,

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THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT and THE HONORABLE RICHARD A. WAGNER,

Respondents,

and

THE STATE OF NEVADA,

Real Party in Interest.

On Writ of Certiorari to the Supreme Court of Nevada

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QUESTION PRESENTED

Does the constitution prohibit the state from forcing people to identify themselves during a police investigation when they are seized upon less than probable cause?

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IN THE

Supreme Court of the United States

No. 03-5554

LARRY D. HIIBEL,

Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT and THE HONORABLE RICHARD A. WAGNER,

Respondents,

and

THE STATE OF NEVADA,

Real Party in Interest.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The December 20, 2002, opinion of the Supreme Court of the State of Nevada denying Mr. Hiibel's petition for a writ of certiorari is published at 59 P.3d 1201 (Nev. 2002). J.A. 14-32. The April 25, 2003, order of the Supreme Court of the State of Nevada denying rehearing is unpublished and is reproduced in the Joint Appendix. J.A. 33-34.

JURISDICTION

A timely petition for a writ of certiorari was filed on July 22, 2003, and was granted on October 20, 2003. The jurisdiction of this Court rests on 28 U.S.C. sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI, clause 2 of the United States Constitution provides, in pertinent part: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."

The Fourth Amendment to the United States Constitution provides, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . but upon probable cause . . . ."

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Nev. Rev. Stat. 171.123 (2001) provides, in pertinent part:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
>
> . . .

> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

This statute was last amended in 1995.

Nev. Rev. Stat. 193.150 (2001) provides, in pertinent part:

> 1. Every person convicted of a misdemeanor shall be punished by imprisonment in the county jail for not more than 6 months, or by a fine of not more than $1,000, or by both . . . .

The cited portion of the statute was last amended in 1981.

Nev. Rev. Stat. 199.280 (2002) provides, in pertinent part:

> A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished:
>
> . . .
>
> 2. Where no dangerous weapon is used in the course of such resistance, obstruction or delay, for a misdemeanor.

This statute was last amended in 1995.

STATEMENT OF THE CASE

For the mere act of refusing to identify himself to a deputy sheriff, petitioner Larry D. Hiibel was arrested and convicted of a crime. The circumstances leading up to his arrest are as follows:

On May 21, 2000, in response to a call from police dispatch, Deputy Lee Dove of the Humboldt County, Nevada, Sheriff's Office drove to where a concerned citizen claimed

to have observed someone striking a female passenger inside a pickup truck. There, Deputy Dove spoke to the concerned citizen and was directed to a parked truck a short distance down the road. When Deputy Dove pulled up to the truck he noticed skid marks in the gravel, suggesting the truck had been parked in a sudden and aggressive manner. Deputy Dove saw Petitioner Larry D. Hiibel standing outside the truck and, based on his eyes, mannerisms, speech, and odor, thought Mr. Hiibel might be intoxicated. Mr. Hiibel's minor daughter was in the passenger side of the truck. When Deputy Dove asked Mr. Hiibel to identify himself, Mr. Hiibel refused. Mr. Hiibel said he would cooperate, but stated that he was unwilling to provide identification because he did not believe he had done anything wrong. Instead, Mr. Hiibel placed his hands behind his back and challenged Deputy Dove to take him to jail. After eleven unsuccessful requests for identification, Deputy Dove arrested Mr. Hiibel. J.A. 9-11, 15-16; *Hiibel v. Sixth Judicial District Court*, 59 P.3d 1201, 1203 (Nev. 2002).

Mr. Hiibel was convicted in the Justice Court of Union Township, in and for the County of Humboldt, State of Nevada, of resisting a public officer in violation of Nev. Rev. Stat. 199.280, a misdemeanor. J.A. 16. The basis for the conviction was that Mr. Hiibel, during a *Terry* stop,[1] had failed to identify himself to a police officer upon request in violation of Nev. Rev. Stat. 171.123. J.A. 3-6.

Mr. Hiibel unsuccessfully appealed his misdemeanor conviction to the Sixth Judicial District Court of the State of Nevada, in and for the County of Humboldt. J.A. 7-12, 13. Thereafter, Mr. Hiibel filed a petition for a writ of certiorari in the Supreme Court of the State of Nevada. In that petition, Mr. Hiibel requested that the court declare as unconstitutional that portion of Nev. Rev. Stat. 171.123 which requires

[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

persons who are the subject of a *Terry* stop to identify themselves. Dec. 4, 2001, Petition for Writ of Certiorari filed in Supreme Court of the state of Nevada. In a split decision, the Supreme Court of the State of Nevada upheld the constitutionality of the statute. J.A.14-32; *Hiibel*, 59 P.3d at 1201. Mr. Hiibel then petitioned for rehearing. Jan. 7, 2003, Petition for Rehearing filed in Supreme Court of the State of Nevada. In his rehearing petition, Mr. Hiibel argued that the Nevada Supreme Court should have analyzed the issue utilizing a Fifth Amendment analysis rather than a Fourth Amendment analysis. It was Mr. Hiibel's position that the court should have utilized a weighing analysis similar to this Court's analysis in *California v. Byers*, 402 U.S. 424 (1971). Utilizing this analysis, Mr. Hiibel reasoned that the Nevada court would find the statute unconstitutional. The Nevada Supreme Court summarily denied rehearing in an unpublished order. J.A. 33-34. Mr. Hiibel then petitioned this Court for relief. July 22, 2003, Petition for Writ of Certiorari filed in Supreme Court of the United States. This Court granted certiorari on October 20, 2003.

SUMMARY OF THE ARGUMENT

In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court approved limited police seizures and frisks of suspects on the street. Because the holding in *Terry* involved an exception to the general rule requiring probable cause to legitimize a seizure, this Court has been careful to maintain the narrow scope of the seizure.

On several occasions this Court has stated that during a *Terry* stop the police are free to ask a suspect any questions they want to further the investigation. However, the suspect does not have to answer those questions. The issue before this Court is whether the requirement to identify oneself is an exception to that rule or whether this Court will breathe life

into its previous statements and make clear once and for all that the Court meant what it said when it said a suspect does not have to answer.

Requiring people to identify themselves during a *Terry* stop upon pain of imprisonment violates both the Fourth and Fifth Amendments to the United States Constitution. Both of these Amendments are made applicable to the states through the Fourteenth Amendment to the United States Constitution. Therefore, any requirement of a Nevada statute that during a *Terry* stop people are required to identify themselves violates the Fourth, Fifth, and Fourteenth Amendments as well as the Supremacy Clause of the United States Constitution—and for this reason must fail.

The Fifth Amendment prevents governmental authorities from compelling people to testify against themselves. Under our system of criminal justice, which is an accusatorial system rather than an inquisitorial system, a person is free to remain silent or choose to speak as an unfettered exercise of free will. The Fifth Amendment protects persons from being compelled to testify against themselves or to otherwise provide the government with evidence of a testimonial or communicative nature. The amendment has been held to apply not only to criminal trials but to formal and informal civil or criminal proceedings.

In the past, this Court has had the opportunity to determine the constitutionality under the Fifth Amendment of statutes which require people to identify themselves. In these cases the Court balanced the government's need to know against the individual's right to remain silent. The inquiry is basically one of whether the statute is criminal or civil in nature. In order to make this determination the Court looks to whether the notice requirement applies to an area of activity that is permeated with criminal statutes, is directed at a highly selective group of persons inherently suspect of criminal activities, and poses a substantial hazard of self-incrim-

ination. By applying these three criteria to the Nevada statute at issue it is clear that this is a criminal investigation permeated with criminal statutes and directed only at criminal suspects. In addition and given the current state of the law, people's names can incriminate them by identifying them as recidivists and subjecting them to greater punishments. In Nevada, this happens in drunk driving and domestic battery cases, for example. Thus, the mere mention of an individual's name can have serious consequences in a subsequent criminal proceeding.

The Fourth Amendment to the United States Constitution protects the individual from being subjected to unreasonable searches and seizures by governmental authorities. This Court has determined that the "probable cause" standard represents the best compromise between the individual's rights to privacy and to be left alone as opposed to the community's interest to enforce the law for its own protection. There have been only limited and well defined exceptions to the probable cause standard.

Allowing the police to arrest people during a *Terry* stop merely because of a failure to identify themselves unnecessarily reduces the "probable cause" standard to one of reasonable suspicion plus the failure to identify. This does not aid the police officer in determining the extent of criminal activity, if any—which was the reason for the seizure in the first place. The only thing which such a standard adds to reasonable suspicion is to allow the police to arrest someone for failing to identify himself. What this means is that a person under a shadow of suspicion, who has not committed any crime, can be approached by the police, do absolutely nothing, and yet be arrested, convicted and incarcerated. Such a standard for incarceration goes to the very nature of the kind of society in which we live: It is inimical to a free society that mere silence can lead to imprisonment.

The test of reasonableness under the Fourth Amendment requires a balancing between the need for the particular search or seizure against the invasion of the individual rights and liberty interests which it entails. Requiring individuals to identify themselves is an intrusion upon important First, Fourth and Fifth Amendment interests in personal security, mobility, and privacy and authorizes a significant intrusion on constitutionally protected liberty interests. These interests outweigh the speculative law enforcement value of requiring identification.

The interests of the individuals are indeed weighty and compel the conclusion that the Nevada statute violates the Fourth Amendment. For example, requiring people to identify themselves intrudes on the Fifth Amendment right to remain silent and to be free from being compelled to be a witness against themselves. In addition, being required to supply the government with information which identifies and aids in convicting one of domestic battery impacts the Second Amendment right to keep and bear arms.

Also, this Court has recognized a certain right of anonymity when individuals are engaged in First Amendment activities such as promoting religious interests and political views. It is not difficult to imagine the chilling effect on the exercise of First Amendment rights of allowing the government to collect the names of those individuals congregating for the purpose of exercising one of the most important rights of a free and democratic people.

Finally, the collection of someone's identity is a far more intrusive act than a mere "frisk." It allows the police to research, at any time, everything that a person is or has been throughout their lives. This is easily accomplished through the massive electronic databanks which exist today.

Balanced against these important interests is a speculative interest in law enforcement. The "frisk" allowed during a

Terry stop was for purposes of protecting the officer, not, as here, to further the investigation. The police should be more concerned with the actions of the suspect and the circumstances surrounding the detention to determine if a crime has been committed rather than concentrate on identity. In truth, identity has no bearing on whether a crime has been committed.

In this case the lower court asserted a heightened need to determine identity because of a present concern for terrorist activity. However, the lower court failed to explain why a highly trained and well-financed Islamic terrorist would draw unnecessary attention by refusing an officer's request for identification. Moreover, false and stolen identities are commonplace in our society.

In summary, those that assert a need for requiring identification fail to explain how this intrusion will aid the resolution of the investigation. Those who assert that this intrusion upon fundamental liberties will somehow make the citizens of the country safer have failed to heed the admonition of one of our forefathers: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." Letter from Benjamin Franklin to Josiah Quincy (September 11, 1773). To the extent that we as a society are willing to give up our essential liberty interests for our temporary safety, we dishonor the sacrifices of those who came before us, some of whom sacrificed their lives. In so doing, we also fail our children and condemn them to live in a society that is no longer "the land of the free."

ARGUMENT

I. INTRODUCTION

Under current Nevada law, persons may be compelled to identify themselves to peace officers acting under reasonable suspicion of criminal activity, and if they refuse, such persons

can be convicted of a misdemeanor and punished by up to six months in jail. Nev. Rev. Stats. 171.123, 193.150, 199.280. The question the Court must answer in this case is as follows: When persons are being lawfully detained upon less than probable cause, may the government constitutionally require them, under threat of imprisonment, to identify themselves?

Petitioner submits that such a government practice is abhorrent to the Constitution. A brief review of the case law leading up to the issue in this case suggests that this Court agrees.

II. BACKGROUND

Detention upon less than probable cause has commonly become known as a *Terry* stop. In *Terry v. Ohio*, 392 U.S. 1 (1968), and the companion case of *Sibron v. New York*, 392 U.S. 40 (1968), this Court approved limited police seizures and frisks of suspects on the street when the police have articulable facts which, taken together with rational inferences from those facts, reasonably warrant suspicion of criminal activities on the part of a suspect. *Terry*, 392 U.S. at 27; *Sibron*, 392 U.S. at 65. When the police have such reasonable suspicion, along with a reasonable belief that the suspect is armed, they may physically seize the suspect and conduct a protective frisk for weapons. *Terry*, 392 U.S. at 30. The police may also detain the suspect for a reasonable time in order to conduct an investigation. *Id.* The issue in this case has to do with the permissible scope of a *Terry* stop.

This Court has held that seemingly innocent conduct can be the basis for reasonable suspicion justifying a *Terry* stop. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). Moreover, this Court recently acknowledged that "the concept of reasonable suspicion is somewhat abstract," and that "the cause 'sufficient to authorize police to stop a person' is an 'elusive concept.'" *United States v. Arvizu*, 534 U.S. 266, 274 (2002) (quoting *United States v. Cortez*, 449 U.S. 411,

417 (1981)). "Suspicion involves so low a degree of belief and so subjective a judgment that it is impossible . . . to draw a line between 'mere' suspicion and a 'reasonable' suspicion." Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. Crim. L. Criminology & Police Sci. 433, 445 (1967). Officers are thus left to rely on their own subjective judgment when deciding who should be *Terry* stopped. By deliberately avoiding reducing that cause to "'a neat set of legal rules,'" the Court has necessarily muddied what, in Nevada, an officer must observe before he may stop, and demand identification from, a person. *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996) (quoting *Illinois v. Gates*, 462 U.S. 213 (1983)).[2] In essence, police officers proceed with neither guidance nor limitations in assessing what behavior qualifies as suspicious.

Thus, under the current state of the law in Nevada, a person can be stopped by the police for engaging in perfectly innocent yet "suspicious" behavior, asked to identify himself,[3] and if he declines, be arrested and hauled off to jail. This is frighteningly reminiscent of Nazi Germany, where people lived in fear of being approached by the Gestapo and commanded to turn over "Your papers, please."

On at least two occasions this Court has been confronted with the very question which is at issue in this case. On both of these occasions this Court has decided the case on other grounds.

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[2] Moreover, the conflict between the United States Court of Appeals for the Ninth Circuit and the Supreme Court of the State of Nevada regarding the constitutionality of Nev. Rev. Stat. 171.123 further highlights the difficulty police officers in Nevada face in determining whether or not they are legally justified in stopping someone. *Compare Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873 (9th Cir. 2002), *with Hiibel v. Sixth Judicial District Court*, 59 P.3d 1201 (Nev. 2002).

[3] NB: For the sake of brevity this brief will use the pronoun "him" to refer to both the male and female gender.

In *Brown v. Texas*, 443 U.S. 47 (1979), this Court was faced with a statute which made it a crime to refuse to identify oneself to a police officer. *Id.* at 48. The appellant had challenged the statute on First, Fourth, Fifth and Fourteenth Amendment grounds. *Id.* at 49. This Court never reached the constitutionality of the statute, however, because it held the initial detention was illegal. *Id.* at 52. Therefore, anything which occurred after the illegal seizure was suppressible.[4]

Another case in which this Court had an opportunity to decide the issue but did not do so was *Kolender v. Lawson*, 461 U.S. 352 (1983). That case involved a statute which required someone to produce identification upon police request. *Id.* at 353. The trial court had reasoned that "'a person who is stopped on less than probable cause cannot be punished for failing to identify himself.'" *Id.* at 354. This Court again did not decide the issue of the constitutionality of compulsory identification, however, and instead held the statute void for vagueness. *Id.* at 353, 361.

While the issue in this case has not been decided, this Court and various of its members have not been entirely silent on the issue. Numerous cases, in the context of deciding other issues, make reference to a person's right not to identify himself or answer other questions put to him by a police officer.

[4] Noting that the lower court had been troubled by the constitutionality of the statute, *id.* at 53-54, this Court stated that it "need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements," *id.* at 53 n.3, because it decided the case on other grounds.

For example, in *Berkemer v. McCarty*, 468 U.S. 420 (1984), authored by Justice Marshall and joined in by Justices Burger, Brennan, White, Blackman, Powell, Rehnquist, and O'Connor, while discussing *Terry* stops this Court stated:

> The stop and inquiry must be "reasonably related in scope to the justification for their initiation". . . . Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obliged to respond.* And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.

Id. at 439-40 (internal citations and footnotes omitted) (emphasis added).

In *Davis v. Mississippi*, 394 U.S. 721 (1969), in a footnote the majority made the following observation:

> The State relies on various statements in our cases which approve general questioning of citizens in the course of investigating a crime. . . . *But these statements merely reiterated the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.*

Id. at 727 n.6 (emphasis added).

Likewise, in *Terry*, Justice White explained in his concurring opinion that, "Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." 392 U.S. at 34 (White, J., concurring). Justice Harlan voiced a similar viewpoint, noting that a person to whom questions are addressed has the "right to ignore his interrogator and walk away." *Id.* at 33 (Harlan, J., concurring).

In his dissenting opinion in *Michigan v. DeFillippo*, 443 U.S. 31, 44 (1979), Justice Brennan, joined by Justices Marshall and Stevens, noted that, although a person may be briefly detained and subjected to questioning under *Terry*, he is not required to answer nor may he be arrested for refusing to do so. He stated:

> In the context of criminal investigation, the privacy interest in remaining silent simply cannot be overcome at the whim of any suspicious police officer. "[W]hile the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer" . . . .
>
> In sum then, individuals accosted by police on the basis merely of reasonable suspicion . . . have a right to remain silent . . . .

Id. at 44-45 (Brennan, J., dissenting) (footnote and citation omitted).

And finally, in *Kolender v. Lawson*, Justice Brennan in concurrence stated:

> [T]he scope of seizures of the person on less than probable cause that Terry permits is strictly circumscribed to limit the degree of intrusion they cause. Terry encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; and, *most importantly, the suspect must be free* to leave after a short time and *to decline to answer the questions put to him.*

461 U.S. at 65 (Brennan, J., concurring) (emphasis added).

Although in *Davis v. Mississipi* this Court referred to the right not to be compelled to answer police questions as a "settled principle," 394 U.S. at 727 n.6, it has never before answered the specific question of whether the constitution

prohibits governments from enacting compulsory identification laws. The instant case presents the Court the opportunity to resolve the issue once and for all.

At this juncture it is important to note that Mr. Hiibel is not claiming that police authorities do not have the right to ask any questions reasonably related to the purpose of the seizure. *See Davis v. Mississippi*, 394 U.S. at 727, n.6. Nor is Mr. Hiibel claiming that the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), apply to a *Terry* stop. *See Berkemer v. McCarty*, 468 U.S. at 440. Moreover, although certainly a strong argument can be made that the Nevada statute is unconstitutionally vague, *cf. Kolender*, 461 U.S. at 361, it is Mr. Hiibel's contention that even if the statute could be rewritten in such a way that it would not be vague, it would nevertheless be unconstitutional as violative of the Fifth and Fourth Amendments.

Mr. Hiibel is, however, asserting that although the police authorities have the right to ask questions, he is not required to answer those questions, in particular questions regarding his identity, and that his failure to do so should not result in criminal sanctions which can include arrest, a fine, and jail.[5] For the reasons that follow, Nev. Rev. Stat. 171.123(3) is violative of the Fifth and Fourth Amendments to the United States Constitution.

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[5] *Cf. Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) (the state may not "make[] a crime out of what under the Constitution cannot be a crime.")

III. THE REQUIREMENT OF NEV. REV. STAT. 171.123(3) WHICH COMPELS A PERSON DETAINED UPON REASONABLE SUSPICION TO IDENTIFY HIMSELF TO THE POLICE VIOLATES THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION.

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."[6] U.S. Const. Amend. V.

The requirement of Nev. Rev. Stat. 171.123(3) that an individual disclose his identity or suffer a criminal conviction frustrates this important Fifth Amendment protection, which is designed to "prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him . . . ." *United States v. White*, 322 U.S. 694, 698 (1944). The Fifth Amendment requires prosecutors "to search for independent evidence instead of relying upon proof extracted from individuals by force of law. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime." *Id.* at 698. As this Court has noted, the privilege "is firmly embedded in our constitutional and legal frameworks as a bulwark against iniquitous methods of prosecution." *Id.* at 699.

The Fifth Amendment safeguards the "right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *see also*

[6] The Fifth Amendment is made applicable to the states through the Fourteenth Amendment. *Malloy v. Hogan*, 378 U.S. 1, 3, 8 (1964).

U.S. Const. Amend. I ("Congress shall make no law . . . abridging the freedom of speech"). Our accusatorial system of criminal justice "demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966) (citation omitted). In short, the proposition *Miranda* has become known for—the right to remain silent—is a bulwark of our legal system.

In speaking of testimony given in response to a grant of legislative immunity this Court has recognized that such statements compelled by law are:

> [T]he essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt. The information given in response to a grant of immunity may well be more reliable than information beaten from a helpless defendant, but it is no less compelled. The Fifth and Fourteenth Amendments provide a privilege against *compelled* self-incrimination, not merely against unreliable self-incrimination.

New Jersey v. Portash, 440 U.S. 450, 459 (1979) (emphasis in original). As noted by Justice Powell, joined in concurrence by Justice Rehnquist, "the Fifth Amendment . . . prohibits a State from using compulsion to extract truthful information from a defendant, when that information is to be used later in obtaining the individual's conviction." *Id.* at 463 (Powell, J., concurring). Accordingly, it is plain that the government is prohibited from requiring a person to identify himself to the police under threat of criminal prosecution because to do so violates the Fifth Amendment privilege against compulsory self-incrimination.

Here too, moreso even than if the police resorted to sophisticated techniques of custodial interrogation (*see Miranda*, 384 U.S. at 448-57), it is the force of the law that extracts proof of identity from the suspect under a *Terry* detention. If the suspect exercises his Fifth Amendment right to remain silent, he is punished as a criminal. There is no right to remain silent if silence receives a criminal sanction. To hold otherwise would render the protections of the Fifth Amendment meaningless.

A. Being Compelled To Identify Oneself To The Police Is A Testimonial Communication Protected By The Fifth Amendment.

The Fifth Amendment protects persons from being compelled to testify against themselves or to otherwise provide the state with evidence of a testimonial or communicative nature. *Schmerber v. California*, 384 U.S. 757, 761 (1966), *see also United States v. Hubbell*, 530 U.S. 27, 34 (2000). It does not protect a person from being compelled to disclose real or physical evidence. *Schmerber*, 384 U.S. at 764. "[I]n order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe v. United States*, 487 U.S. 201, 210 (1988) (quoted in *Pennsylvania Muniz*, 496 U.S. 582, 589 (1990)). Being compelled to identify oneself to an inquiring officer is not evidence of real or physical evidence in the nature of physical characteristics such as blood or handwriting exemplars; rather, it is evidence of a testimonial or communicative nature that, upon disclosure, can itself be incriminating or lead to incriminating evidence. If it did not, the police would have little interest in asking persons their names or identities. Consciousness of who we are goes to the very essence of our being, and being commanded to reveal our identity and hence face the "trilemma" of truth, falsity, or

silence, *Muniz*, 496 U.S. at 597, causes us to reveal evidence which is testimonial at its core.

Significantly, in *Lefkowitz v. Turley*, 414 U.S. 70 (1973), this Court said of the Fifth Amendment privilege against compelled self-incrimination:

> The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

Id. at 77. Thus, it does not matter that Mr. Hiibel was asked to identify himself in the context of a *Terry* stop rather than in a formal judicial proceeding. In fact, it appears that this Court and various of its members have assumed that the Fifth Amendment's prohibition against compulsory self-incrimination applies to *Terry* stops. *See, e.g., Berkemer*, 468 U.S. at 439-40; *Terry*, 392 U.S. at 34 (White, J., concurring); *DeFillippo*, 443 U.S. at 44-45 (Brennan, J., dissenting). Following the dictates of *Lefkowitz*, *supra*, this assumption is plainly correct. Compulsory identification for purposes of permitting an officer "to ascertain his identity and the suspicious circumstances surrounding his presence abroad," Nev. Rev. Stat. 171.123(3), is inherently testimonial and falls within the purview of the Fifth Amendment. By itself, the identification process can be incriminating or lead to evidence which might incriminate the person in future criminal proceedings. It is therefore the type of testimonial or communicative evidence which the Fifth Amendment is designed to protect against being compelled.

B. Utilizing The Analysis Of *California v. Byers*, Nev. Rev. Stat. 171.123(3) Violates The Fifth Amendment.

In *California v. Byers*, 402 U.S. 424 (1971), this Court analyzed the constitutionality, under the Fifth Amendment, of a California "hit and run" statute which required motorists involved in a property damage accident to stop and give their names and addresses. In a plurality opinion by Chief Justice Burger, the Court stated a general rule as follows:

> Whenever the Court is confronted with the question of a compelled disclosure that has an incriminating potential the judicial scrutiny is invariably a close one. Tension between the State's demand for disclosures and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly.

Id. at 427. The opinion discussed three factors that determine whether a self-reporting requirement violates the Fifth Amendment privilege against self-incrimination: Whether the notice requirement (1) applies to an area of activity that is "permeated with criminal statutes," (2) is directed at a "highly selective group inherently suspect of criminal activities," and (3) poses "substantial hazards of self-incrimination." *Id.* at 430 (citing *Albertson v. SACB*, 382 U.S. 70 (1965); *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1968), and *Haynes v. United States*, 390 U.S. 85 (1968)). In the cited cases of *Albertson*, *Marchetti*, *Grosso*, and *Haynes*, the Court found that compliance with the statutory disclosure requirements would confront the petitioner with substantial hazards of self-incrimination because they might require admission of a crucial element of a crime. *Byers*, 402 U.S. at 429-30. In addition, in these

cases the disclosures condemned were only extracted from a highly selective group inherently suspect of criminal activities, such as members of a Communist organization (*Albertson*), gamblers (*Marchetti*, *Grosso*), and possessors of firearms (*Haynes*). Finally, the privilege was applied in the cases in areas permeated with criminal statutes—not in "an *essentially noncriminal* and *regulatory area* of inquiry." *Byers*, 402 U.S. at 429 (emphasis in original).

In contrast to *Albertson*, *Marchetti*, *Grosso*, and *Haynes*, the Court in *Byers* upheld the statute requiring motorists involved in an accident to give their names. *Byers*, 402 U.S. at 430-31. However, the opinion found it significant that the law "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liberties." *Id.* at 430. It was essentially regulatory, not criminal, in nature. *Id.* Nor was the law aimed at a "highly selective group inherently suspect of criminal activities," but rather, it was directed "at the public at large." *Id.* at 430 (internal quotation marks and citations omitted). Moreover, under the circumstances the required disclosure was an "essentially neutral act" under the statute, although the opinion noted that disclosure was "always subject to the driver's right to assert a Fifth Amendment privilege concerning specific inquiries." *Id.* at 432-33.

Although *Byers* involved motorists, Mr. Hiibel asserts that its analysis is equally applicable to situations involving pedestrians. The essential question is not whether the statute applies to motorists or pedestrians (Nev. Rev. Stat. 171.123 applies to both), but whether its identification requirement applies in a criminal context to a select group posing a self-incrimination hazard. Mr. Hiibel submits that it does. For this reason, *Byers*, though analytically on point, is factually distinguishable.

C. Nevada's Compulsory Identification Requirement: 1) Applies To An Area Of Activity That Is Permeated With Criminal Statutes, 2) Is Directed At A Highly Selective Group Of Persons Inherently Suspect Of Criminal Activities, And 3) Poses A Substantial Hazard Of Self-Incrimination; It Is Therefore Violative Of The Fifth Amendment.

Applying the analytical framework from *Byers*, it becomes clear that the Nevada statute at issue violates the Fifth Amendment protection against compelled self-incrimination. In stark contrast to the facts of *Byers*, Nev. Rev. Stat. 171.123(3) is entirely different. The request for identification takes place during a valid Fourth Amendment seizure when there is an articulable suspicion that criminal activity is afoot. *See* Nev. Rev. Stat. 171.123; *Terry v. Ohio*, 392 U.S. 1 (1968). Therefore, the only time the request for identification takes place is during an actual criminal investigation. Failure to identify oneself can be the basis for the crime of resisting a public officer, a misdemeanor punishable by up to six months in jail. Nev. Rev. Stats. 193.150, 199.280. Unmistakably, then, this is an area of activity "permeated with criminal statutes" under *Byers*. Moreover, the statute is directed at a "highly selective" group of persons "inherently suspect of criminal activities," as it is limited to persons whom the officer believes "has committed, is committing or is about to commit a crime," and the officer is limited to inquiring about the person's identity and "suspicious circumstances surrounding his presence abroad." Nev. Rev. Stat. 171.123(1), (3). Most significantly, the type of encounter authorized by Nev. Rev. Stat. 171.123 poses a "substantial hazard" of self-incrimination under *Byers*. The circumstances of this case demonstrate how there is a direct likelihood that being compelled to identify oneself can be incriminating by providing testimonial information in one's name that could be used as evidence against a suspect otherwise lacking probable cause for arrest.

In this case the officer, having been advised that someone was seen striking a female passenger inside a pickup truck, was investigating a possible battery or domestic battery.[7] The same last name can be evidence of a relationship which triggers the domestic battery laws. *See* Nev. Rev. Stat. 33.018. The alleged victim of the battery was Mr. Hiibel's daughter. Thus, one's name can in itself be incriminating.[8]

Moreover, domestic battery differs from simple battery in a number of ways. Police officers must arrest a suspect in a domestic battery case as opposed to using their discretion in a battery case. Nev. Rev. Stat. 171.137. Once arrested, a domestic battery suspect cannot be bailed out of jail for a minimum of twelve (12) hours and then only at exorbitant amounts of bail unless the suspect appears before a magistrate, which can take at least as long as forty-eight hours. Nev. Rev. Stat. 178.484(5); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). Moreover, under 18 U.S.C. 922(g)(9), a person convicted of a misdemeanor crime of domestic violence may not lawfully possess a firearm and thus loses his Second Amendment right to bear arms forever. Finally, domestic battery, like driving under the influence, subjects offenders to increased punishment for those having prior offenses, ultimately constituting a felony. Compare Nev. Rev. Stats. 200.481, 200.485 and 484.3792.

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[7] In addition, the officer noticed the smell of alcohol on Mr. Hiibel's breath, and thus was faced with a possible drunk driving situation. Recall that Deputy Dove encountered Mr. Hiibel standing outside a pickup truck along the side of the road.

[8] Similarly, even merely sharing a residence can be evidence of a relationship which triggers the domestic battery laws. *See* Nev. Rev. Stat. 33.018. Thus, giving one's address can be equally incriminating.

The prior record of the offender is discoverable through sophisticated electronic databases indexed by name among other ways.[9] It is clear that at this time in our criminal justice, a person's name can be used to enforce a harsher penalty. While the police can obtain this information through other sources (e.g., fingerprints), the Fifth Amendment protects individuals from being compelled to provide information which tends to incriminate them. Nev. Rev. Stat. 171.123's requirement that a detained person identify himself plainly violates this important constitutional safeguard.

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[9] For example, through databases such as the National Crime Information Center (NCIC), the Multi-State Anti-Terrorism Information Exchange (MATRIX), and Florida's Driver and Vehicle Information Database (DAVID), officers can access information regarding a person's name; address; city; county; phone number; social security number; race; sex; date and place of birth; age; physical characteristics; photographic array; fingerprints; signature; employment; professional licenses; voter registration information; property ownership; utilities; bankruptcies, liens and judgments; driver's and other licenses; license plate & registration information; vehicle identification number; status as a missing or wanted person; arrests, warrants, and juvenile and adult convictions; whether the person is in possession of stolen property or vehicles; etc. *See generally*, 28 U.S.C. 534; Bureau of Justice Statistics, *Report of the National Task Force on Privacy, Technology and Criminal Justice Information*, NCL 187669 (Aug. 2001); Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update*, NCJ 187670 (Dec. 2001); *MATRIX and ATIX: Information Programs Developed in Response to September 11, 2001*, Ga. Homeland Security Bulletin No. 20-03 (Ga. Office of Homeland Security), Aug. 1, 2003; Institute for Intergovernmental Research, *MATRIX Program Objectives #1*, at www.iir.com/matrix/objectives_1.htm; Florida Department of Highway Safety and Motor Vehicles, DAVID Brochure, at *casey.hsmv.state.fl.us.intranet/ddl/AAMVA/david.pdf*. These databases can be searched on partial information. Thus, officers can avail themselves of "one stop shopping" by using a single piece of information to access a wealth of detailed information about the person with whom they are dealing.

Additionally, little imagination is required to devise scenarios in which compelled identification can be incriminating. For example, in *Kirby v. Illinois*, 406 U.S. 682 (1972), a lawfully stopped suspect produced the credentials of a mugging victim upon an officer's demand for identification. In another case, *United States v. Purry*, 545 F.2d 217 (D.C. Cir. 1976), officers requested identification from a suspect whose wallet they had discovered at the scene of a crime. In each of these cases, the proof of identity provided evidence supporting an eventual conviction. Therefore, in both of these cases a statutory requirement of self-identification would have constituted compelled self-incrimination in violation of the Fifth Amendment.

As can be readily seen from the above discussion, compelled identification during a *Terry* stop is a testimonial communication which gives police authorities information that can be later used in a subsequent criminal proceeding. The Nevada statute applies to an area of activity that is permeated with criminal statutes, is directed at a highly selective group of persons who are inherently suspect of criminal activities, and poses a substantial hazard of self-incrimination. Because this statute directly contravenes the protections preserved by the Fifth Amendment, it must be held unconstitutional.

IV. NEV. REV. STAT. 171.123(3) REQUIRING INDIVIDUALS WHO ARE THE SUBJECT OF A *TERRY* STOP TO IDENTIFY THEMSELVES VIOLATES THE FOURTH AMENDMENT PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES.[10]

A. Probable Cause Is The Bedrock Of The Fourth Amendment And Is Required Before A Person Can Be Arrested For Refusing To Produce Identification.

Imposition of criminal sanctions for the refusal to produce identification, when the demand for identification is made without probable cause to believe an offense has been committed, violates the Fourth Amendment rights of individuals: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ."[11] U.S. Const. Amend. IV.

Over a period of decades this Court has stressed many times the central importance of the probable cause requirement to the protection of a person's privacy afforded by the guarantees of the Fourth Amendment. *See, e.g., Henry v. United States*, 361 U.S. 98, 100 (1959). As stated, for example, in *Dunaway v. New York*, 442 U.S. 200 (1979): "The long-prevailing standards of probable cause embodied the best compromise that has been found for accommodating

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[10] This argument was raised in *Kolender v. Lawson*, 461 U.S. 352 (1983), but because this Court decided the case on vagueness grounds it never reached this issue. *Id.* at 361 n.10; Brief for Appellee Edward Lawson, No. 81-1320, October Term 1982.

[11] The prohibition against unreasonable searches and seizures guaranteed by the Fourth Amendment is applicable to the states as part of the due process clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

the often opposing interests in safeguarding citizens from rash and unreasonable interferences with privacy and in seeking to give fair leeway for enforcing the law in the community's protection." *Id.* at 208 (internal quotation marks, brackets and citation omitted).

The Fourth Amendment's protection of the right to privacy and its safeguards against unreasonable searches and seizures are not shed simply because an individual leaves his home to walk or drive the streets. According to *Terry v. Ohio*, 392 U.S. 1 (1968):

> This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized, 'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'

Id. at 8-9 (citation omitted). In short, this represents the right that Brandeis and Warren articulated in their seminal "Right of Privacy" law review article: the "right to be let alone." Warren & Brandeis, "The Right of Privacy," 4 Harv. L. Rev. 193 (1890-91).

Although the Court in *Terry* created an exception to the principle that seizures of the individual must be based on probable cause, the standard of probable cause continues to govern. "Because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." *Dunaway*, 442 U.S. at 210. *See also Michigan v. DeFillippo*, 443 U.S. 31, 44 (1979) (Brennan, J., dissenting) ("[T]he authority of police to accost citizens on the basis of suspicion is 'narrowly drawn.'") (quoting *Terry*, 392 U.S. at 27).

The test of reasonableness under the Fourth Amendment requires a balancing of the need for the particular search or seizure "against the invasion of personal rights that the search [or seizure] entails." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). Balancing those competing interests in this case reveals that the scales tip heavily in favor of protecting individual rights.

B. By Requiring Identification Under Force Of Law During A Seizure With Less Than Probable Cause, Nev. Rev. Stat. 171.123(3) Undermines The Probable Cause Standard By Sanctioning An Arrest For Merely Failing To Identify Oneself.

The requirement of Nev. Rev. Stat. 171.123(3) that proof of identity be disclosed upon no more than satisfaction of the *Terry* criteria of reasonable suspicion represents an unwarranted departure from the probable cause standard so essential to Fourth Amendment freedoms. The statute effectively undermines the probable cause standard by sanctioning an arrest where there are insufficient grounds to arrest the suspect for the underlying offense that was the predicate to the initial stop. *See e.g., Lawson v. Kolender*, 658 F.2d 1362, 1366-67 (9th Cir. 1981), *aff'd, Kolender v. Lawson*, 461 U.S. 352 (1983). When a suspect refuses to provide proof of identity under Nev. Rev. Stat. 171.123(3), the officer is justified in arresting the suspect for violating Nev. Rev. Stat. 199.280. Thus, Nevada law impermissibly allows an officer to conduct a complete search incident to arrest even though he has only a suspicion of underlying criminal activity.

Accordingly, Nevada's statutory scheme violates the Fourth Amendment because, as a result of the demand for identification, "the statutes bootstrap the authority to arrest on less than probable cause." *Carey v. Nevada Gaming Control Bd.*, 279 F.3d 873, 880 (9th Cir. 2002) (quoting *Lawson*, 658

F.2d at 1366-67) (internal quotation marks omitted). In addition, the serious intrusion on personal security, privacy and mobility that results from enforcement of the statute "outweighs the mere possibility that identification might provide a link leading to arrest." *Lawson*, 658 F.2d at 1367-68; *see also Martinelli v. City of Beaumont*, 820 F.2d 1491, 1494 (9th Cir. 1987) (an arrest grounded on refusal to identify oneself during a *Terry* stop violates the Fourth Amendment). *Accord, United States v. Butler*, 223 F.3d 368, 374 (6th Cir. 2000); *United States v. Obasa*, 15 F.3d 603, 607 (6th Cir. 1994); *Richardson v. Bonds*, 860 F.2d 1427, 1432 (7th Cir. 1988); *Moya v. United States*, 761 F.2d 322, 325 (7th Cir. 1984); *Gaynor v. Rogers*, 973 F.2d 1379 (8th Cir. 1992); *United States v. Brown*, 731 F.2d 1491, 1494, *modified on other grounds*, 731 F.2d 1505 (11th Cir. 1984); *Timmons v. City of Montgomery*, 658 F. Supp. 1086, 1093 (D. Ala. 1987); *Spring v. Caldwell*, 561 F. Supp. 1223, 1229-30 (D. Tex. 1981), *rev'd on other grounds*, 692 F.2d 994 (5th Cir. 1982); *City of Pontiac v. Baldwin*, 413 N.W.2d 689, 699 (Mich. App. 1987); *People v. DeFillippo*, 262 N.W.2d 921 (Mich. 1977), *rev'd on other grounds, Michigan v. DeFillippo*, 443 U.S. 31 (1979); *People v. Berck*, 300 N.E.2d 411, 414-16 (N.Y. 1973); *State v. White*, 640 P.2d 1061 (Wash. 1982); *Burks v. State*, 719 So.2d 29 (Fla. App. 1998); *State v. Huan*, 361 N.W.2d 336 (Iowa App. 1984).

"A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown v. Texas*, 443 U.S. 47, 51 (1979). *See generally Steagald v. United States*, 451 U.S. 204, 212, 215-16 (1981); *See v. Seattle*, 387 U.S. 541, 545 (1967). Yet Nev. Rev. Stat. 171.123(3) loosens constitutional control over discretionary and potentially arbitrary police conduct. By imparting a general investigative statute with criminal sanctions, it substitutes standards for mere inves-

tigatory activities, i.e., reasonable suspicion, in place of the constitutional standard imposed by the Fourth Amendment for arrest, i.e., probable cause. It allows the requirement of probable cause to be functionally subverted inasmuch as it facilitates arrests and searches based on artifice where an insufficient basis exists to arrest the suspect for the underlying offense that justified the initial stop. As such, it violates the Fourth Amendment.

If, as this Court has unanimously held, "[a] direction by a legislature to the police to arrest all 'suspicious' persons would not pass constitutional muster," *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169 (1972) (footnote omitted), then a blanket direction to arrest all "suspicious" persons who refuse or are unable to dispel the suspicions officially perceived as to their activities should be similarly unconstitutional. *Id.* ("Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system"). For persons who refuse to identify themselves, the police still lack more than just reasonable suspicion, "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States v. Cortez*, 449 U.S. 411, 417-18 (1981). Certainly, the mere refusal to identify oneself does not add enough to a *Terry*-based suspicion to give rise to probable cause to arrest for the underlying activity that prompted the stop.

Nev. Rev. Stat. 171.123(3), at its core, makes criminal an individual's refusal to identify himself. The sole intent of the law's identification requirement is to find out who the person under detention is—to increase police knowledge about that individual in order to create a case against him. The statute is otherwise useless: surely once the person provides identification to the police, without more facts brought to the attention of the officer to establish probable cause to arrest or arouse reasonable suspicion warranting further investigation, the person is free to go. The statute therefore creates "a crime

out of what under the Constitution cannot be a crime."[12] *Michigan v. DeFillippo*, 443 U.S. 31, 45 (1979) (Brennan, J., dissenting) (quoting *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971)). It manufactures probable cause from the outside edge of the *Terry* standard to create a violation of Nev. Rev. Stat. 199.280. As the Ninth Circuit held in *Lawson v. Kolender*, "as a result of the demand for identification, the statutes bootstrap the authority to arrest on less than probable cause." 658 F.2d at 1366-67. Nev. Rev. Stats. 171.123 and 199.280 authorize arrest and conviction "for conduct that is no more than suspicious. A legislature could not reduce the standard for arrest from probable cause to suspicion; and it may not accomplish the same result indirectly by making suspicious conduct a substantive offense." *Id.* at 1367 (internal quotation marks and citation omitted).

Yet that is precisely what has happened in Nevada. Nev. Rev. Stat. 171.123(3) collapses the probable cause requirement for a search incident to arrest into the *Terry* standard. In *United States v. Robinson*, 414 U.S. 218 (1973), this Court stressed the "distinction in purpose, character, and extent" between a search incident to an arrest and the limited search for weapons authorized by *Terry*. *Id.* at 227 (quoting *Terry*, 392 U.S. at 21-22). Said the Court:

> The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon . . . is also justified on other grounds . . . and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest,

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[12] *Cf. Thompson v. Louisville*, 362 U.S. 199, 204-06 (1960) (conviction for not giving satisfactory account of oneself and for arguing with police violated due process because there was no evidence of guilt of loitering or disorderly conduct); *Norwell v. Cincinnati*, 414 U.S. 14, 16 (1973) (conviction for disorderly conduct reversed as violative of free speech rights where defendant voiced objection to questionable detention).

> however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. . . . Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby . . . .

Id. at 227-28 (citations omitted).

Nev. Rev. Stat. 171.123(3) undoes this distinction for persons detained under its provisions. Since "[n]othing in Terry can be understood to allow a generalized 'cursory search for weapons' or, indeed, any search whatever for anything but weapons," *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979), an officer ordinarily cannot, consistent with the Fourth Amendment, examine the contents of a wallet or purse for proof of a subject's identity where probable cause to arrest does not first exist. However, under Nev. Rev. Stat. 171.123(3), persons to whom the demand for proof of identification is directed are unable to rely upon this constitutional standard. For even when no probable cause to arrest exists, they must either themselves furnish proof of identification or where a request for identification is refused, the police may take the person and search him incident to the arrest and determine his identification at the time of the search or at the police station. The law cannot reach into an individual's pocket to obtain proof of identity on the *Terry* standard alone, yet Nev. Rev. Stat. 171.123(3) requires the individual to do the reaching for the police. *Cf. Hiibel*, 59 P.3d at 1209 (Agosti, C.J., dissenting) ("With today's majority decision, the officer can now, figuratively, reach in, grab the wallet and pull out the detainee's identification). The reaching is not merely figurative, however: where the individual objects, the law then finds supposed "probable cause" within itself, and thereby proceeds to authorize the police to reach into the suspect's pocket for themselves as a search incident to arrest. *See DeFillippo*, 443 U.S. at 46 (Brennan, J., dissenting) (police acting on less than probable cause may not search, compel answers, or search those who

refuse to answer their questions). The search consequently takes place unconstitutionally—without the suspicions justifying the stop and demand for identification ever ripening into probable cause.

C. Nev. Rev. Stat. 171.123(3) Authorizes Significant Intrusion On The Individual's Constitutionally Protected First, Fourth, And Fifth Amendment Liberty Interests Even Though These Important Interests In Personal Security, Mobility And Privacy Greatly Outweigh The Intrusion's Speculative Law Enforcement Value.

The enforcement of Nev. Rev. Stat. 171.123(3)'s identification requirement significantly impairs the exercise of constitutionally protected interests in personal security, mobility and privacy. "In the absence of any basis for suspecting [an individual] of misconduct, the balance between the public interest [in preventing crime] and [the individual's] right to personal security and privacy tilts in favor of freedom from police interference." *Brown v. Texas*, 443 U.S. 47, 52 (1979).

The balance between constitutional rights and crime prevention does not shift by conditioning the demand for proof of identity upon the police first establishing a *Terry* basis for detention. As already noted, although the police have the right to request persons to answer voluntarily questions concerning unsolved crimes, they have no right to compel their answers. *E.g., Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984); *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969); *see also Dunaway v. New York*, 442 U.S. 200, 210 n.12 (1979). In balancing the need for the particular seizure against the invasion of personal rights that it entails,

it is apparent that Nev. Rev. Stat. 171.123(3) authorizes a significant intrusion on constitutionally protected liberty interests.

Intrusions upon protected interests where officers lack probable cause to arrest have always been "brief and narrowly circumscribed." *Dunaway*, 442 U.S. at 212. Here, the interference is materially different. By transforming refusal to answer into a basis for arrest, Nev. Rev. Stat. 171.123(3) effectively compels answers from persons who are unwilling to sacrifice their liberty in order to maintain their constitutionally protected interests in privacy, security and mobility. Consequently, Nev. Rev. Stat. 171.123(3) effectively functions as a "suspicious persons' registration act," authorizing the police to collect the names of individuals although their only reason for appearance in law enforcement files may be the exercise of constitutional rights. Yet, unlike authoritarian countries like China, the United States does not require its citizens to register with the authorities. Upholding the constitutionality of Nev. Rev. Stat. 171.123(3) would have the effect of authorizing a national identification system.

Nev. Rev. Stat. 171.123(3) significantly intrudes upon several fundamental constitutional rights. As demonstrated in Section III above, the statute significantly intrudes upon the Fifth Amendment because it requires persons to identify themselves or suffer arrest, in violation of their right against self-incrimination. Also, as demonstrated in Section IV.B. above, the statute significantly intrudes upon the probable cause standard of the Fourth Amendment by reducing probable cause to arrest to a mere reasonable suspicion coupled with the refusal to identify oneself, in violation of the person's rights against unreasonable search and seizure.

In addition to the significant intrusions discussed above, Nev. Rev. Stat. 171.123(3) also intrudes upon the First Amendment right to speak or not to speak freely. Moreover, this Court has recognized that citizens who are engaging in

certain First Amendment activities are entitled to some amount of anonymity. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y. v. Village of Stratton*, 536 U.S. 150, 166 (2002) (door to door religious solicitation); *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 199 (1999) (political petition circulation); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995) (distribution of campaign literature); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 463 (1958) (membership in a nonprofit association).

For example, in *Watchtower*, this Court struck down a requirement that door-to-door canvassers obtain a permit from the city as a condition of that canvassing. One of the reasons offered by the Court was that such a scheme robbed noncommercial canvassers of the right to solicit anonymously. Because would-be canvassers must be "identified in a permit application filed in the mayor's office and available for public inspection," a surrender of anonymity necessarily resulted. *Id.* at 166.

It is not difficult to see how officers might circumvent the result in *Watchtower*, whether intentionally, or more likely, by merely carrying out what they believe to be legitimate police activity: Persons proceeding door-to-door, especially in the evening, could reasonably be suspected of casing prospective burglary targets. Thus, an officer might reasonably have the requisite level of suspicion to stop those canvassers, and ascertain whether their intent is lawful or not. As part of that stop, under the Nevada Supreme court's ruling in this case, the officer would have the power to demand the identity of those canvassers.

If officers were to routinely *Terry* stop door-to-door canvassers, the result would be that innocent parties, such as the plaintiffs in *Watchtower*, would become ensnared. They would have to justify themselves, and their identities, to officers whenever engaging in what *Watchtower* held was

protected First Amendment activity. Even if such stops of canvassers were sporadic, the ability to demand their identities could well have exactly the chilling effect described and condemned by the majority in *Watchtower*.

In a similar vein, in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), this Court held that involuntary disclosure of membership lists could only be effected by the government upon a sufficiently compelling reason. *Id.* at 463. Alabama's interest did not survive the heightened test, despite the fact that Alabama was armed with an existing court order and had a reasoned need for the list in conjunction with litigation.

It is difficult to explain how the membership list in *NAACP* was not sufficiently important to Alabama, yet identities of persons stopped pursuant to *Terry* are so important to officers that they might be unmasked upon mere reasonable suspicion. As with the facts in *Watchtower*, it takes little imagination to foresee an evasion of the result in *NAACP* in which officers, even well-meaning ones, observe large congregations of black persons, especially at night, and in high-crime areas. The chilling effects on NAACP meetings, gatherings of Communists, and Klan members alike, is equally evident.[13]

Plainly, as the Court has recognized under these cases, there would be a chilling effect on protected First Amendment activity if the government were allowed to keep a list of "suspicious persons" who expressed minority views or political views opposed to current governmental policies—or

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[13] Moreover, such dragnets of persons of color are hardly confined to conjecture. Black men in particular often find themselves being stopped, questioned and searched by police pursuant to policies of indiscriminately stopping and frisking members of youth gangs, often in blatant disregard of constitutional norms. T. Maclin, Book Review: *Seeing the Constitution from the Backseat of a Police Squad Car*, 70 B.U.L. Rev. 543, 570 (1990).

of persons who merely wished to remain anonymous when out and about. It is not difficult to imagine how the authority to stop and identify could be abused in the context of First Amendment protections. The facts of *Watchtower* illustrate the potential for abuse. A group of young men are approaching the door of each apartment in a large complex. Are these youths distributing religious or political material or are they casing the residences looking for an unlocked door? In another instance, a group of people are gathering along the sidewalks. Are these people going to engage in a religious activity or engage in a legal political protest regarding engagement in a foreign war? Under the rule that will be decided in this case will the government be able to record the names of people engaged in First Amendment activities and political protests under the guise of crime prevention? Such a ruling would be more reminiscent of a totalitarian state that registers and restricts its citizens rather than a nation of free people expressing opposing religious and political views.

Finally, in contrast to the pat-down search authorized by *Terry*, seizures pursuant to Nev. Rev. Stat. 171.123(3) are peculiarly personal, directed specifically toward the individuals against whom the police apply its identification requirement. The intent of the statutory intrusion, after all, is discovery of the person's identity. The frisk, while concededly "a severe, though brief, intrusion upon cherished personal security," *Terry*, 392 U.S. at 25, nonetheless constitutes an immediate and limited incursion upon an anonymous person. State intervention through a pat-down finishes with its administration: police know no more about the subject of the search than they did moments before.

It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, "he has 'seized' that person." *Terry*, 392 U.S. at 16. Yet, unlike a frisk, which ends upon its conclusion and simply informs the officer whether or not the suspect is armed,

obtaining a person's identity is just the tip of the iceberg in terms of what information an officer can discover. As the Ninth Circuit observed in *Lawson*,

> In contrast, police knowledge of the identity of an individual they have deemed 'suspicious' grants the police unfettered discretion to initiate or continue investigation of the person long after the detention has ended. Information concerning the stop, the arrest and the individual's identity may become part of a large scale data bank.

Lawson v. Kolender, 658 F.2d at 1368. By entering the detainee's name, the police can obtain a disquieting amount of information about the detainee that can go far beyond the purpose for the initial stop. *See* n. 9, *supra* at 24.

A frisk "must surely be an annoying, frightening, and perhaps humiliating experience," *Terry*, 392 U.S. at 25, and possibly some will consider it moreso than enforcement of the identification requirement of Nev. Rev. Stat. 123.123(3). But this acknowledgement does not diminish the significant impact of the statute upon the detained person. For the individual stopped knows, as do those observing, that wrongdoing is strongly connoted by his act of reaching upon his person to secure identification papers, followed by their production to the police for verification and entry into a database.

As has been established, the detainee has significant constitutionally protected interests in not incriminating himself, in being free from unreasonable search and seizure, in freedom of speech, and in maintaining his anonymity. These interests in personal security, mobility and privacy are not outweighed by the government's interest in obtaining identification during a *Terry* stop.

D. Nev. Rev. Stat. 171.123(3) Does Not Meaningfully Advance Any Significant Governmental Interest In Crime Prevention.

To determine whether the identification requirement of Nev. Rev. Stat. 171.123(3) satisfies Fourth Amendment strictures, it is necessary to balance the intrusions upon the individual constitutional rights just described against "the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen." *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 534-35 (1967). The state has asserted broad interests of crime detection and prevention in support of the statute in the lower courts. These interests are not, of course, of the same magnitude as the constitutional interests asserted by Mr. Hiibel *supra* at IV.C. This Court, moreover, is expected to accept such a generalized justification for intrusions on recognized constitutional interests on faith, without benefit of analysis.

While prevention of crime is a "weighty social objective," *Brown v. Texas*, 443 U.S. 47, 52 (1979), it is unclear to what degree, if any, making criminal the refusal to disclose identification will itself further that objective or the objective of crime detection. Moreover, as demonstrated in Section III above, to the extent that identification furthers the objective of crime detection and prosecution, it is violative of the detainee's Fifth Amendment right against compulsory self-incrimination.

Further, the interests assertedly served by identification requirements—crime prevention and detection—have never been found by this Court to be sufficient by themselves to justify a seizure beyond an initial stop upon less than probable cause. In *Terry*, the brief detention of an individual to permit officers a limited frisk for weapons was premised upon "the neutralization of danger to the policeman in the investigative circumstance." 392 U.S. at 26. At issue then

was much more than a general interest in effective crime prevention and detection: "there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could . . . be used against him." *Id.* at 23.

The Court in *Terry* described as "[t]he crux of th[e] case . . . not the propriety of [the officer's] taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for [the officer's] invasion of [petitioner's] personal security by searching him for weapons in the course of that investigation." *Id.* The purpose of the pat-down was to enable the police to carry out the investigation in safety, not, as here, to compel the detainee to assist actively the purpose of the stop. The "sole justification" of a protective frisk in a *Terry* situation "is the protection of the police officer and others nearby." *Id.* at 29. It must therefore "be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Id.* Cases following *Terry* have consistently repeated this basis for permitting the frisk. *See, e.g., Ybarra v. Illinois*, 444 U.S. 85, 93 (1970); *Dunaway v. New York*, 442 U.S. 200, 209-10 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977); *Adams v. Williams*, 407 U.S. 143, 146 (1972).

In balancing the asserted governmental interests against the infringement of the detainee's constitutional rights, this Court must assess not only the substantiality of those interests but also the relationship of an identification requirement to them. Under Nev. Rev. Stat. 171.123(3), police are authorized to demand and obtain by use of criminal sanction identification when there is suspicion of criminal activity. This suspicion may relate to such serious criminal behavior as robbery, murder or other violent crimes, but it may equally relate to nonviolent criminal activity such as soliciting door-to-door without a license or hitchhiking in the roadway. The state

cannot establish that the identification requirement is causally linked to its blanket interest in crime prevention and detection in any substantial manner, nor can it show that its interest outweighs Mr. Hiibel's significant First, Fourth and Fifth Amendment rights. By any measure, the state's interest in identification of individuals suspected of an offense is therefore far less substantial than the detainee's constitutional rights to personal security, mobility and privacy.

In sum, although the generalized justifications offered in this case to uphold Nev. Rev. Stat. 171.123(3) were also asserted in those cases involving the few exceptions to the probable cause requirement previously sanctioned, the Court has always rested those exceptions upon far narrower and far more compelling concerns. Here no comparable concerns exist. Moreover, the procedure at issue here is far less effective at serving the broad interests of crime prevention and detection than were the procedures, such as a search for weapons, at issue in earlier cases. Hence, any demand for one's name or identification absent probable cause for arrest offends the Constitutional protections afforded by the Fourth Amendment.

The majority decision of the Nevada Supreme Court "avoids the fact that knowing a suspect's identity does not alleviate any threat of immediate danger." *Hiibel*, 59 P.3d at 1209 (Agosti, C.J. dissenting). What it fails to recognize is that "it is the observable conduct, not the identity, of a person, upon which an officer must legally rely when investigating crimes and enforcing the law." *Id.* Being forced to identify oneself to a police officer or else face arrest "is government coercion—precisely the type of governmental intrusion that the Fourth Amendment was designed to prevent." *Id.*

In parting, petitioner will conclude with a quote from the dissenting opinion of the Chief Justice of the Nevada Supreme Court:

> . . . Now is precisely the time when our duty to vigilantly guard the rights enumerated in the Constitution becomes most important. To ease our guard now, in the wake of fear of unknown perpetrators who may still seek to harm the United States and its people, would sound the call of retreat and begin the erosion of civil liberties. ... . The majority, by its decision today, has allowed the first layer of our civil liberties to be whittled away. The holding weakens the democratic principles upon which this great nation was founded. . . . At this time, this extraordinary time, the true test of our national courage is not our necessary and steadfast resolve to defend ourselves against terrorist activity. The true test is our necessary and steadfast resolve to protect and safeguard the rights and principles upon which our nation was founded, our constitution and our personal liberties.

Hiibel, 59 P.3d at 1209-10 (Agosti, C.J., dissenting).

CONCLUSION

For the reasons stated above, Nev. Rev. Stat. 171.123(3) violates the Fourth and Fifth Amendments to the United States Constitution because it compels people to identify themselves during a police investigation when they are seized upon less than probable cause. Accordingly, the judgment of the Nevada Supreme Court should be reversed.

Respectfully submitted,

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No. 03-5554

In The Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

vs.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA AND THE COUNTY OF HUMBOLDT AND THE HONORABLE RICHARD A. WAGNER, DISTRICT JUDGE,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Nevada

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QUESTIONS PRESENTED

1. Whether requiring an individual, lawfully detained on reasonable suspicion, to identify himself constitutes an unreasonable search and seizure under the Fourth Amendment.

2. Whether requiring an individual, lawfully detained on reasonable suspicion, to identify himself is a violation of the privilege against self-incrimination under the Fifth Amendment.

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STATEMENT OF THE CASE

On May 21, 2000 Humboldt County Deputy Sheriff Lee Dove received a call from the Humboldt County Sheriff's Dispatch. Deputy Dove was informed that an individual called and stated he had observed a man hit a woman inside a red and silver GMC truck on Grass Valley Road in Humboldt County, Nevada. Deputy Dove drove his patrol vehicle south on Grass Valley Road and stopped his vehicle near the intersection of Thomas Canyon and Grass Valley Road. He had a brief conversation with the reporting person, Mr. Riddley. Mr. Riddley informed Deputy Dove that he was the person who made the call and pointed in a direction down the road where the vehicle was located. (App. 9).

Deputy Dove then drove further south on Grass Valley Road where he observed a red and silver GMC truck pulled off to the side of the road. He noticed skid marks in the gravel, leading Deputy Dove to believe that the truck had been pulled off the road in a fast and aggressive manner. When Deputy Dove got out of his vehicle he saw a male, Larry Dudley Hiibel, (hereinafter referred to as Hiibel) standing outside the truck. Due to Hiibel's mannerisms while standing outside the truck, Deputy Dove believed Hiibel was intoxicated. (App. 9-10, 16-17).

As Deputy Dove approached Hiibel he noticed a female inside the truck. Pursuant to Nevada Revised Statute (NRS) 171.123(3), which requires an individual to identify himself when detained on reasonable suspicion, Deputy Dove asked Hiibel to identify himself. Hiibel asked "why"? Deputy Dove explained that he needed his identification because of the reported fight. (App. 4). Hiibel refused and continued to act agitated and angry toward

Deputy Dove. Deputy Dove asked Hiibel to identify himself eleven different times. On each occasion Hiibel refused to comply with this request. During this encounter Hiibel placed his hands behind his back and challenged Deputy Dove to arrest him and take him to jail. (App. 4, 10, 17). Deputy Dove finally told Hiibel that if he did not identify himself he would be arrested. (App. 4). Hiibel again refused to identify himself and Deputy Dove placed him under arrest. (App. 4, 17).

Hiibel was charged with violating NRS 199.280, resisting an officer, on the basis of his failure to identify himself pursuant to NRS 171.123(3). On December 13, 2001 a criminal trial was held. At the conclusion of the trial the court found Hiibel guilty. (App. 3-5). Hiibel appealed the trial court's decision to the Sixth Judicial District Court of Humboldt County, Nevada. (App. 6). The District Court affirmed Hiibel's conviction. (App. 6-14). Hiibel filed a Writ of Certiorari to the Nevada Supreme Court. The court agreed to consider the merits of Hiibel's Petition for Writ of Certiorari.

On December 20, 2002 the Nevada Supreme Court issued a written opinion denying Hiibel's petition. In the opinion the court held that the Fourth Amendment only protects against unreasonable searches and seizures. The court balanced the public interest and the individual's right to personal security as it relates to the requirements of NRS 171.123(3). The court concluded that in light of the concerns for officer safety it is reasonable to require a person, who is detained on reasonable suspicion, to identify himself when requested by the officer. (App. 19). The court also stated that requiring a person to identify himself was a minimal intrusion and providing your name does not constitute providing incriminating information.

The court reasoned that NRS 171.123(3) is a commonsense requirement that protects both the public and officers. (App. 22-24). On April 25, 2003, Hiibel's petition for rehearing was also denied by the Nevada Supreme Court. (App. 36). On July 22, 2003, Hiibel filed his Petition for Writ of Certiorari with the United States Supreme Court. On October 20, 2003, this court granted Hiibel's Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

When determining if a particular search or seizure is a violation of the Fourth Amendment, a court must consider two competing interests: the public's interest and the individual's right to personal security free from arbitrary interference by law enforcement. The process in resolving this conflict requires a court to decide first whether the conduct is an unreasonable search or seizure under the common law. If this inquiry fails to resolve the issue, the court should then evaluate the conduct by applying traditional standards of reasonableness.

The common law and nightwalker statutes permitted peace officers to detain individuals and demand they give an account of themselves. It can be assumed that as part of this inquiry the detained individual would be required to identify himself. The Framers had knowledge of the common law and these statutes at the time the Fourth Amendment was drafted. In fact, many States had enacted similar statutes prior to and at the time the Fourth Amendment was drafted. Since it was acceptable under the common law for an officer to detain an individual and

ask him to account for his presence, the Framers would not find it unreasonable to detain a person on reasonable suspicion and require him to state his name.

Applying traditional standards of reasonableness to the facts in this case, it is clear that the government's interest outweighs Hiibel's right to personal security. Requiring a lawfully detained person to identify himself is a minimal intrusion. This act does not require an officer to physically touch the suspect, move him to a different location or extract bodily fluids. NRS 171.123(3) merely requires a person, lawfully detained on reasonable suspicion, to identify himself. This requirement can be met either by stating a name or producing an identification card. How the person chooses to identify himself is left to his or her discretion. Placing this discretion with the detained person reduces the intrusive nature of the request and removes any discretion by the officer to determine if the identification satisfies the statute. Of course, if the person provides a false name the officer may continue to detain the person until the conflict is resolved.

In addition, the Court, in dicta, has indicated that obtaining a suspect's fingerprints in the field may be reasonable and a permissible intrusion under the Fourth Amendment if supported by reasonable suspicion. If the Court is inclined to uphold compelled fingerprinting by field officers, it should not find requiring a lawfully detained suspect to identify himself to be unreasonable. Both acts reveal the identity of the detained person yet stating your name is far less intrusive.

Obtaining a suspect's name is also the essence of good police work. It allows the officer to find out what type of individual he is investigating and whether the suspect

presents a potential threat to the officer's safety. The officer will be able to determine if the suspect's name matches the name on any outstanding warrants or teletypes issued from either his own jurisdiction or another jurisdiction. If the suspect's name matches the information entered into the National Crime Information Center (NCIC) or National Law Enforcement Telecommunication System (NLETS), the officer will be in a position to either arrest the suspect or inform the issuing agency of the suspect's whereabouts. This furthers the substantial governmental interests of crime detection and crime prevention.

An individual certainly has the right to personal security free from arbitrary interference of law enforcement officers. However, when considering that requiring a person to identify himself is a minimal intrusion, promotes effective law enforcement and advances the safety of the officer, an individual's right to personal security diminishes. As a result, a person does not have a Fourth Amendment right to refuse to identify himself when detained on reasonable suspicion.

The Fifth Amendment protects an individual from being compelled to give testimonial communication. Stating your name is not testimonial. Compelling a person to state their name simply gives the government access to documents or information about the defendant. The government is still obligated to pursue its investigation in search of this information. Compelling a person, lawfully detained on reasonable suspicion, to identify himself does not require the person to speak to his guilt. Though the name may link the person to an outstanding warrant, it does not compel the person to inform the officer that he has an outstanding warrant in another jurisdiction. A

person's name is more like a fingerprint, voice exemplar or handwriting writing analysis. It is used by law enforcement to identify the person.

In addition, stating your name is not incriminating. The name being communicated already exists and is quasi-voluntarily created. This Court has ruled that if a document is voluntarily created prior to the request to produce, it is not protected by the Fifth Amendment even though the document may contain incriminating writing. Applying this rationale to a person's name, though the name itself may be incriminating, it is not protected by the Fifth Amendment because it is voluntarily created. Perhaps a better analogy would be if the person was required to produce a driver's license as opposed to stating his or her name. A driver's license is more akin to a document but compelling a person to produce a driver's license or national identification card is more intrusive than merely stating your name. As a result, this Court should only decide that a person, lawfully detained on reasonable suspicion, is required to identify himself and allow the person to choose how he or she will comply with this requirement.

Hiibel contends that the name will lead to incriminating evidence. However, stating your name is not the type of answer this Court was concerned with in *Hoffman v. United States*, 341 U.S. 479 (1951). It does not reveal a person's association with others or where he is employed. Clearly, the compelled answer, under the facts presented in this case, is not protected by the Fifth Amendment. In addition, there are numerous circumstances where providing your name may lead to incriminating circumstances but is not necessarily a violation of the Fifth Amendment. For instance, this Court stated that an arrestee can be

required to state his name, address, height, weight, eye color, date of birth and age during the booking process. Yet the booking officers are likely to run the arrestee's name through NCIC to determine if any outstanding warrants match the name. Though it may lead to incriminating evidence, this Court is unlikely to permit an arrestee to refuse to provide this information because it does not promote the policy enunciated in *Hoffman*.

The protections offered in *Miranda* also do not apply under these facts. The purpose of *Miranda* is to inform a person of his rights prior to custodial interrogation. Hiibel was never placed in custody prior to being asked to identify himself. Therefore, he cannot claim the protections of *Miranda*. Finally, when announcing its decisions regarding a person's obligation to answer questions during a *Terry* detention, this Court has stated that a person cannot be compelled to answer questions relating to unsolved crimes. Asking a person, lawfully detained on reasonable suspicion, to state his or her name is not asking about an unsolved crime. It communicates no information about a crime but only gives access to the information about the person. For these reasons, this Court should affirm the Nevada Supreme Court's decision and find that NRS 171.123(3) does not violate the Fourth and Fifth Amendments of the United States Constitution.

ARGUMENT

The Fourth Amendment claim presented in Petitioner's Writ of Certiorari asks whether a lawfully detained individual is required to identify himself to a law enforcement officer during the initial stages of a criminal

investigation pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). As in *Terry*, this Court is being asked in the case at bar to consider the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances. *Id.* at 4. However, unlike *Brown v. Texas*, 443 U.S. 47, 51-52 (1979), both parties agree that Deputy Dove had reasonable suspicion to detain Hiibel for the crimes of battery and driving while under the influence of alcohol.[1] As a result, the issues in this case arise from the conduct occurring after a lawful detention and must be evaluated in terms of Fourth Amendment reasonableness. When applying the standards articulated by this Court and considering the strong public policy supporting the reasonableness of the officer's conduct in this case, Hiibel simply cannot demonstrate that his rights under the Fourth Amendment have been violated.

I.

Requiring an Individual Lawfully Detained on Reasonable Suspicion to Identify Himself to an Officer Does Not Violate the Fourth Amendment.

The Fourth Amendment of the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue,

[1] Hiibel conceded before the Nevada Supreme Court that Deputy Dove had reasonable suspicion to detain him.

> but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

This Court has applied a two part analysis when determining if a particular act by a law enforcement officer constitutes a violation of the Fourth Amendment. *Wyoming v. Houghton*, 526 U.S. 295, 299-300 (1999). The first consideration is whether the conduct complained of was regarded as an unlawful search or seizure under the common law at the time the Fourth Amendment was framed. *Atwater v. City of Lago Vista*, 532 U.S. 318, 326-327 (2001); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). If that inquiry provides no suitable answers then the search or seizure must be evaluated under traditional standards of reasonableness. This involves weighing an individual's privacy interests against the legitimate interests of the government. *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-653 (1995). The analysis presented below demonstrates that requiring a lawfully detained person to identify himself is not unreasonable under the Fourth Amendment.

A. Requiring an individual lawfully detained on reasonable suspicion to identify himself would not be regarded as an unreasonable search or seizure under the common law at the time the Fourth Amendment was drafted.

The common law supports the proposition that, under certain circumstances, a person may be required to identify himself to an officer. In *Atwater v. City of Lago Vista*,

532 U.S. 318 (2001), this Court cited numerous English Statutes in support of its opinion that the common law allowed warrantless arrests for misdemeanor offenses. This Court recognized that the legal background of the Framers of the Fourth Amendment would have included knowledge of these English statutes and that this knowledge would have been incorporated into the Framers concept of reasonableness. *Id.* at 333. Included in these English statutes are the so called "nightwalker" statutes. These statutes authorized a peace officer and night watchmen to detain any suspicious person and inquire as to what they were doing. These statutes also authorized a peace officer to make inquiry of all persons being lodged in the suburbs or other places in town. *Id.* at 333-334. These nightwalker statutes did not just pertain to felons but applied to other individuals as well. *Id.* at 334 n.8.

In *Minnesota v. Dickerson*, 508 U.S. 366, 380-383 (1993), Justice Scalia stated in his concurring opinion that:

> "there is good evidence that the "stop" portion of the *Terry* "stop-and-frisk" holding accords with the common law – that it had long been considered reasonable to detain suspicious persons for the purpose of demanding that they give an account of themselves. This is suggested, in particular, by the so-called night-walker statutes, and their common-law antecedents. See Statute of Winchester, 13 Edw. I, Stat. 2, ch. 4 (1285); Statute of 5 Edw. III, ch. 14 (1331); 2. W. Hawkins, Pleas of the Crown, ch. 13 § 6, p. 129 (8th ed. 1824)"

Id. at 380.

These references to English statutes are in accord with William Blackstone's Commentaries on the Laws of England. Blackstone's commentaries state that the common law provided for various law enforcement offices including sheriff, justice of the peace and constable, whose primary responsibility was to keep the peace for the King. The sheriff was charged with apprehending individuals who break the peace and defend against the king's enemies. The justice of the peace was also responsible for apprehending criminals and two or more justices could hear and determine all felonies and other offenses. Constables were charged with keeping the peace and had power to arrest, imprison and break open houses. Their primary duty was to keep watch and apprehend all rogues, vagabonds and nightwalkers and make them give an account of themselves. 1 W. Blackstone, *Commentaries on the Laws of England* 328-345 (1769).

Since these nightwalker statutes and the common law allowed an officer to detain a person and compel him to give an account of himself, it is reasonable to assume this authority included requiring the detained person to identify himself. Based on this assumption and the fact that the Framers were familiar with these laws, requiring a lawfully detained person to identify himself would not be considered an unreasonable search or seizure under the common law.

B. Requiring an individual, lawfully detained on reasonable suspicion, to identify himself is permissible when considering traditional standards of reasonableness.

This Court has held that the touchstone of the Fourth Amendment is reasonableness and that reasonableness is

measured in objective terms based on the totality of the circumstances. *United States v. Knights*, 534 U.S. 112, 118-119 (2001); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996). Further, when considering the reasonableness of the conduct this Court will balance the degree it intrudes on the individual's Fourth Amendment interests against its promotion of a legitimate governmental interest. *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652-653 (1995). Applying these standards to the issues in this case, as set forth below, it is not unreasonable to require a person lawfully detained on reasonable suspicion to identify himself.

1. The law constitutes a minimal intrusion.

When determining the reasonableness of the governmental conduct this Court has consistently considered the extent of the intrusion into the detained person's life. In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court found that "even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.* at 24-25. Though this intrusion was deemed annoying, frightening and humiliating, the Court determined that the intrusion was permissible. The Court found that its justification, officer safety, was more important than protecting the detained person's right of personal security. *Id.* at 27, 29.

This Court has adopted the same rationale in other contexts such as traffic stops. In *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) and *Maryland v. Wilson*, 519 U.S. 408 (1997), this Court found that requiring a driver or a passenger to get out of the vehicle during the course of the

traffic stop was a minimal intrusion and did not outweigh the important interests of an officer's safety. 434 U.S. at 110-111; 519 U.S. at 413-15. In addition, this Court has also upheld mandatory employee and student-athlete drug testing. *See Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989); *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995). In each of these instances the governmental conduct is much more intrusive than requiring a lawfully detained person to identify himself.

The Court in *Terry* also stated that "the manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." 392 U.S. at 28. The plain meaning of NRS 171.123 reveals that the manner in which a suspect's name is obtained simply contemplates that the person identify himself to the officer. This identification requirement can be accomplished verbally or by showing an identification card. The detained person has the discretion to decide what method he will use to comply with this statutory requirement, and the statute does not give the officer the authority to reject either method. As long as the person identifies himself, how he accomplishes that requirement is not important. Furthermore, he cannot be arrested for resisting an officer if he chooses to verbally identify himself as opposed to presenting an identification card.

Hiibel contends that other methods for obtaining a person's name can be used to obtain a person's identification such as fingerprinting. This argument lacks merit. As previously stated, this Court will consider the intrusiveness of the governmental conduct when balancing the competing interests of the government and the individual. Comparing the requirement of stating your name to

compelled fingerprinting, it is clear that the latter is much more intrusive. The act of fingerprinting requires the officer to physically touch the detained person and move him to a different location so the act may be accomplished. The act of stating your name involves no physical contact, no movement of the suspect and is far less intrusive.

This Court addressed the issue of fingerprinting in *Davis v. Mississippi*, 394 U.S. 721 (1969). In *Davis* the Court ruled that it was a violation of the Fourth Amendment to transport a person to police headquarters and briefly question and fingerprint him for investigative purposes without probable cause, warrant or consent to justify the intrusion. 394 U.S. at 726-727. However, the *Davis* Court noted that fingerprinting constituted a less serious intrusion upon the personal security than other types of police searches, and detentions and that "fingerprinting involves none of the probing into an individual's private life and thoughts that marks an interrogation or search. . . ." *Id.* In *Haynes v. Florida*, 470 U.S. 811 (1985), the Court revisited the permissible limits of fingerprinting a suspect based on reasonable suspicion. The Court reversed petitioner's conviction under the *Davis* rationale but in dicta stated that a brief detention in the field based on reasonable suspicion for the purpose of fingerprinting may be permissible under the Fourth Amendment. 470 U.S. at 816-817.

If a lawfully detained person may be compelled to provide fingerprints in the field, the same justification holds true for compelling a person to identify himself. Both are means of identifying the person and do not involve probing into the suspect's private life and thoughts. By comparison, compelling a suspect to be fingerprinted in

the field is more physically intrusive than simply compelling him to state his name. However, both requirements are reasonable in light of the strong governmental interest in detecting and preventing crime. As a result, this Court should find that when balancing the government's interests against a person's right of personal security interest, requiring a lawfully detained person to identify himself to an officer is reasonable and not a violation of the Fourth Amendment. *See Maryland v. Wilson*, 519 U.S. 408, 411 (1997).

Also, the intrusion complained of in this case occurred in a public place. This Court has previously discussed the significance of whether the intrusive conduct occurred in a public or private place. *See New Jersey v. T.L.O*, 469 U.S. 325, 337 (1985); *United States v. Mendenhall*, 446 U.S. 544, 555 (1980). This factor gives context to the intrusion and either mitigates or aggravates the intrusive nature of the governmental conduct. The encounter between Deputy Dove and Hiibel occurred alongside a public road. This allowed Deputy Dove's conduct to be subject to scrutiny by passersby traveling on the same road and reduced the potential of "heavy handed" or abusive tactics directed toward Hiibel. *See Berkemer v. McCarty*, 468 U.S. 420, 438-439 (1984). This factor further adds to the reasonableness of requiring Hiibel to identify himself.

It is evident that the requirements of NRS 171.123(3) constitute a minimal intrusion. The conduct does not require the detained person to be pat-frisked, moved, or to expel bodily fluids. The detained person retains the discretion to decide how to comply with the statute and provides no authority to the officer to determine if the method used is appropriate. In light of the minimal intrusion involved in this governmental conduct, this

Court should find that the requirements of NRS 171.123 (3) are reasonable and do not violate the Fourth Amendment.

2. The law allows an officer to engage in the essence of good police work.

In *Adams v. Williams*, 407 U.S. 143 (1972), this Court discussed the function of an officer during a *Terry* investigation. In *Adams*, an officer received information from a known informant that Williams was seated in a nearby car. The informant told the officer Williams was carrying drugs inside the car and had a gun tucked in his waistband. The officer approached the car and asked Williams to roll down his window. As he did so, the officer reached into the car and removed the gun from William's person. This Court reaffirmed the principles enunciated in *Terry v. Ohio*, 392 U.S. 1 (1968) but also provided some reasons for an intermediate response. In doing so, this Court stated: "on the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity, or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.* at 145-146 (citations omitted).

It appears the Court in *Adams* believed that determining the identity of the person being detained is part of the "essence of good police work" and one of the justifications for a *Terry* detention. Therefore, it is only reasonable to conclude that a lawfully detained person ought to be compelled to provide identification. Finding otherwise

would undermine an essential purpose of this intermediate response. It would be inconsistent for this Court to state that it is permissible for an officer to determine a suspect's identity but allow the suspect to refuse to give his name. By giving the suspect this right the officer's efforts in trying to identify the suspect would be useless and place him in the difficult position of trying to engage in good police work but not having the authority to do so. *See State v. Flynn*, 92 Wis.2d 427, 439-449, 285 N.W.2d 710, 715-720 (1979). The State does not believe this was the intent of the Court when it rendered its decision in *Terry*. Therefore, this Court should allow an officer to engage in the "essence of good police work" and require a lawfully detained individual to identify himself when requested by the officer.

3. The law gives added protection to an officer.

Officer safety is an important concern during any investigative encounter and must be considered when determining if an officer has a reasonable interest in obtaining a lawfully detained suspect's identification. Officers routinely detain individuals based on reasonable suspicion that the person may have committed a crime. These encounters present difficult circumstances filled with the possibility of harm to the officer, particularly when the officer is investigating a crime relating to violence. If the officer can acquire the suspect's name at the beginning of the lawful detention, the officer can request the suspect's criminal history and ask if there are any outstanding warrants. Upon receiving this information, the officer will be in a better position to know who he is confronting and can take necessary precautions to ensure

his safety. Though every lawfully detained suspect could potentially harm the officer, having this information can alert the officer as to the likelihood of such harm. As a result, this information will play an important role in how officers conduct themselves during these encounters and assist them in evaluating the potential threat to their safety.

This concept and concern is not new to this Court's Fourth Amendment jurisprudence. In fact, this Court has previously discussed officer safety under a variety of circumstances and concluded that a minimal intrusion into a person's life was justified given the concern for the officer's safety. In *Terry*, the Court carved out an exception to the probable cause requirement for searches and seizures under the Fourth Amendment. In *Terry*, Officer McFadden observed three suspects engage in suspicious conduct. After observing this conduct he approached the suspects and asked them for their names. In response, the suspects mumbled something that was not clear to McFadden. Since McFadden did not receive a clear response to his request for identification he grabbed Terry, spun him around and patted down his outer clothing. In the left breast pocket of Terry's overcoat McFadden felt a weapon. He reached inside the coat but could not remove the gun. Subsequently, McFadden ordered Terry and the other suspects inside a store. He removed Terry's overcoat and retrieved the gun. *Id.* at 5-7.

This Court upheld officer McFadden's conduct and found that it did not violate the protections of the Fourth Amendment against unreasonable searches and seizures. In considering these facts, the majority noted that an apprehension of danger may arise long before the officer has sufficient information to arrest the suspect. As a

result, when balancing the officer's safety against the intrusion of frisking a person, the officer's interest in taking steps to assure himself that the suspect is not armed with a weapon that could be used against him was more important. *Id.* at 23, 27. Indeed, the sole justification of the search was to protect the officer. *Id.* at 29.

In the instant case, one of the reasons for asking the suspect to identify himself is to protect the officer. *See Adams v. Williams*, 407 U.S. 143, 146 (1972) (the purpose of the limited search was not to discover evidence of crime but to allow the officer to pursue his investigation without fear of violence). When an officer initially asks a person to identify himself, he wants to pursue the investigation with a better understanding of the type of person he is confronting. This information will help to alleviate any fear of not knowing if the person is or is not a potential threat to his safety. Any information that is derived after a suspect provides his name becomes part of the officer's assessment in determining if the suspect may be armed and presents a threat to his safety.

In *Maryland v. Wilson*, 519 U.S. 408 (1997), the Court discussed officer safety as a legitimate, reasonable basis to justify intruding into the personal security of a lawfully detained individual. This Court was asked to decide if a passenger could be ordered out of a lawfully stopped vehicle. In considering this question, the majority and Justice Stevens in dissent, agreed that there is a "strong public interest in minimizing the number of assaults on law officers." *Id.* at 413 n.2. The Court held that when considering the potential danger a passenger presents to an officer, authorizing an officer to order the passenger out of the car was a minimal intrusion on that person's personal security. *Id.* at 413-415.

As previously argued, a "strong public interest" exists in this case. It is important that an officer be given the ability to create a safer environment when confronting an individual who may have committed a crime. Just like allowing an officer to frisk a person for weapons or remove a passenger from a car in order to deny him access to a weapon, obtaining information about the individual's criminal history creates a safer environment. It creates a safer environment because the officer will be given information about the person's past and whether they have a history of violence. A person with a history of violence certainly poses a much greater threat to the officer's safety. Having this information would assist the officer to better evaluate the circumstances confronting him. If the officer knows the person has a history of violence he can call for back up or draw his duty weapon. If the person has no history of violence the office may take a less aggressive posture. Whatever decision is made by the officer will be based on less guess work and more information. This can only lead to a safer environment for both officer and suspect. Therefore, compelling a person to provide their name is certainly a reasonable method of protecting an officer and other individuals. *See Allen v. City of Los Angeles*, 66 F.3d 1052, 1056, 1057 (9th Cir. 1995) (police officers are entitled to employ reasonable methods to protect themselves and others in potentially dangerous situations).

4. The law promotes the government's interest in crime prevention and crime detection.

Requiring a lawfully detained individual to identify himself is part of the overall legitimate interest of law

enforcement in promoting crime prevention and crime detection. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968). Often, officers are given information about a crime that has occurred or is about to occur, including the suspect's name. When an officer detains a person on reasonable suspicion he should be allowed to use that information. If a suspect is allowed to withhold his name, the legitimate purposes of crime prevention and detection are frustrated. The protections of the Fourth Amendment do not go this far. In addition, the officer should be allowed to find out whether there are any outstanding warrants or bulletins on the detained person. This can be accomplished by submitting the detained suspect's name through the Federal Bureau of Investigation's National Crime Information Center (NCIC). The National Crime Information Center was established in 1965 and was created because of a continuing rise in the national crime rate. NCIC is governed by 28 U.S.C. § 534 and 18 U.S.C. § 924(e). This computerized system started out with fifteen (15) on-line state and city area terminals connecting into the FBI's central computer.

By 1971 all fifty (50) states and the District of Columbia were hooked up to NCIC. *National Crime Information Center: 30 years on the Beat*, The Investigator (December 1996 – January 1997 issue) http://permanent.access.gpo.gov/lps3213.ncici November 21, 2003). This information system includes, but is not limited to: the person's name, date of birth, social security number, FBI number, criminal arrests and charges as well as a physical description. NCIC Code Manual Personal Descriptors p. 1-39 (2000) *available at* www.leds.state.or.us/resources/ncic_2000/ncic_2000code_manual.htm-6k. NCIC also provides information regarding persons with outstanding warrants, missing persons, a "Temporary Felony Want," adjudicated

juveniles who have absconded, individuals designated by the U.S. Secret Service as posing a potential danger to the President of the United States and members of violent gangs. *See* National Crime Information Center (NCIC) FBI Information Systems, *available at* http://www.fas.org/irp.agency/doj/fbi/is/ncic.htm.

The creation of the National Crime Information Center system has formed a cooperating network among all federal, state, metropolitan, and rural law enforcement agencies throughout the United States. Access to the system can only be accomplished by authorized law enforcement personnel. It is a tremendous asset to the officer in the field when confronting a detained person and locating wanted fugitives. The NCIC system is an essential law enforcement tool that is used in detecting and preventing crime.

Another system associated with NCIC is the National Law Enforcement Telecommunication System or NLETS. This system allows law enforcement agencies to broadcast an All Points Bulletin (APB) listing the name and other identifiers of a person suspected of committing a crime. If the suspect is detained, the issuing jurisdiction will be notified of the suspect's location. If an officer had reasonable suspicion to detain this particular individual but could not obtain the person's name, the suspect's status would go undetected. This would delay the issuing jurisdiction's investigation and ability to determine who may have committed the alleged crime.

These references illustrate why the purpose of a *Terry* detention should encompass more than just the detection and prevention of the underlying crime. If the goal of a *Terry* detention is to detect and prevent crime, it must

include the ability to assist other law enforcement agencies in detecting and preventing crime arising out of their respective jurisdictions. This Court's decision in *United States v. Hensley*, 469 U.S. 221 (1985), lends additional support to this argument. In *Hensley*, officers received a flyer from another law enforcement agency indicating that Hensley may have been involved in an aggravated robbery. The flyer instructed officers to pick up Hensley if located and hold him for investigation purposes. Officers from the City of Covington, Ohio, encountered Hensley but allowed him to leave. After Hensley left, one of the officers thought he remembered some information on a flyer regarding Hensley's involvement in a past crime.

While the information was being confirmed an officer located Hensley's car. As he drove up to the car he recognized the passenger and knew he was a convicted felon. When the officer walked up to the open passenger door he saw a handgun underneath the passenger's seat. The officer arrested the passenger and subsequently searched the car. Two additional handguns were found and Hensley was arrested. 489 U.S. at 224-225. Hensley was convicted in federal court but the Sixth Circuit Court of Appeals reversed his conviction. In reversing the Sixth Circuit's decision this Court stated, "Despite these differences, where police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, or check identification in the absence of probable cause promotes the strong governmental interest in solving crimes and bringing offenders to justice. . . ." 489 U.S. at 229. Pursuant to *Hensley*, it is clear this Court recognizes that obtaining identification during a lawful investigative detention is an important

part of police work and promotes the strong governmental interest in detecting and preventing crime.

C. *Lawson v. Kolender* and its progeny are inapposite to the Fourth Amendment issues presented in this case.

Several federal circuit courts, including the Ninth Circuit Court of Appeals, have addressed the identification issue presented in this case and are referred to by Hiibel in support of his argument. These cases have arisen in the context of a civil lawsuit pursuant to 42 U.S.C. § 1983. However, when deciding this issue these courts have reached conflicting conclusions. In *Lawson v. Kolender*, 658 F.2d 1362 (9th Cir. 1981), the Ninth Circuit was asked to determine the constitutionality of a California vagrancy law and whether the requirement to provide identification upon request of an officer violated the Fourth Amendment. The court considered the interests of law enforcement but ultimately determined that an individual's right to personal security outweighed the interests of law enforcement. The court concluded that the vagrancy law allowed an officer to arrest a person on less than probable cause. As a result, the court ruled that requiring a person to identify himself was an unreasonable search and seizure under the Fourth Amendment.

The case at bar presents a different legal issue than that presented in *Lawson*. The statute in *Lawson* gave unfettered discretion to an officer to detain a person simply because he was wandering from "place to place without apparent reason." 658 F.2d at 1363; *Kolender v. Lawson*, 461 U.S. 352, 360-361 (1983). This statute criminalized an individual's right to freely move about. The

statute essentially took the concept of consensual encounters and gave officers authority to detain on less than reasonable suspicion and arrest on less than probable cause. The person was not free to ignore the questions and continue walking. *See United States v. Mendenhall*, 446 U.S. 544, 553-554 (1980). Instead, the person was required to provide identification upon request by the officer or be arrested.

In this context, the Ninth Circuit correctly concluded that since the underlying basis for stopping the person could not be a crime, the officer did not possess reasonable suspicion. Therefore, requiring the person to provide identification was illegal and violated the Fourth Amendment. However, in the instant case, Hiibel was being detained because there was reasonable suspicion that he had committed the crime of battery and driving while under the influence of alcohol, not because he was in a particular area. Lawson's conduct was protected by the United States Constitution. *See City of Chicago v. Morales*, 527 U.S. 41, 53-54 (1999). Hiibel's conduct is not. Therefore, the legal rationale of *Lawson* cannot be applied to the facts in this case because the underlying premise is different.

The same holds true in *Martinelli v. City of Beaumont*, 820 F.2d 1491 (9th Cir. 1987) and *Carey v. Nevada Gaming Control Board*, 279 F.3d 873 (9th Cir. 2002), *cert. denied*, 537 U.S. 805 (2002). In both of these cases, the Ninth Circuit Court of Appeals relied upon *Lawson v. Kolender*, 658 F.2d 1392 (9th Cir. 1981) and determined that under the Fourth Amendment an individual could not be compelled to identify himself. However, the court's reasoning in these opinions lacks merit. The court failed to recognize that the reason the California vagrancy statute in *Lawson*

violated the Fourth Amendment was because it allowed officers to detain a person for engaging in constitutionally permissible conduct. In *Martinelli* and *Carey* the suspects' detention was based on a constitutionally valid criminal statute and therefore the officers had reasonable suspicion to detain them. Therefore, the rationale used in *Lawson* would not apply.

In light of these two decisions, it appears the Ninth Circuit Court of Appeals has moved to a general conclusion that a lawfully detained person can never be compelled to provide identification. This Court should disregard the Ninth Circuit's decisions in *Martinelli* and *Carey* and place greater weight on the Tenth Circuit Court of Appeals' opinion in *Oliver v. Woods*, 209 F.3d 1179 (10th Cir. 2000). In *Oliver*, the Tenth Circuit held that the officers' initial reasonable suspicion ripened into probable cause that Oliver had violated several Utah laws when he refused to identify himself. The Tenth Circuit Court of Appeals ruled that Officer Woods had lawfully detained Oliver on reasonable suspicion that Oliver may have committed a crime. *Id.* at 1188. The court cited *Adams v. Williams*, 407 U.S. 143 (1972) and stated "when an officer is conducting a lawful investigative detention based on reasonable suspicion of criminal activity, the officer may ask for identification and an explanation of the suspect's presence in the area." *Id.* at 1189. The court further reasoned that since the detention was lawful the request to provide identification was a lawful order. Therefore, Oliver's refusal was a violation of a criminal statute that required him to comply with a lawful order, i.e. to provide identification. As a result, Officer Woods could have reasonably believed he had probable cause to arrest Oliver and therefore did not

violate his Fourth Amendment rights by placing him under arrest. 209 F.3d at 1188-1189.

In *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) this Court stated:

> But we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simply to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.

Id. at 347 (citations omitted).

The Tenth Circuit Court of Appeals' reasoning is persuasive and furthers the policies mentioned in *Atwater*. The Nevada Supreme Court also agreed that the reasoning in *Oliver* was a correct application of the Fourth Amendment to the identification issue presented in this case. The rationale of the Nevada Supreme Court promotes effective law enforcement based on a common sense approach to the daily encounters experienced by an officer in the field. Without a proper investigation those who are innocent might be falsely accused. Those who were guilty

might wholly escape prosecution and many crimes would go unsolved. As a result, the security of all would be diminished. *Haynes v. Washington*, 373 U.S. 503 (1963). The State asks this Court to consider the reasoning of *Oliver* and find that a lawfully detained person does not have a Fourth Amendment right to refuse to identify himself when an officer is engaged in a lawful duty.

D. This Court's opinions regarding consensual encounters do not apply to NRS 171.123(3).

The amicus brief submitted by the American Civil Liberties Union (ACLU) supports its argument by referring to cases involving consensual encounters. (Brief p. 4-12). Citing *Florida v. Royer*, 460 U.S. 491 (1983), the ACLU states there are three narrowly confined areas to a *Terry* "stop and frisk." (ACLU Amicus Brief p. 7). Referring to the third area, amicus writes "most significantly for purposes of this case, the police officer may question the individual detained, but the individual need not answer any questions put to him, indeed he may decline to listen to the questions at all and may go on his way." (ACLU Amicus Brief p. 7-8). *Royer* is inapplicable to this case. It is clear the *Royer* court is considering the context of a consensual encounter, not an investigative or *Terry* stop.

In the context of a consensual encounter a "person need not answer any question put to him." 460 U.S. at 498. However, Hiibel cannot claim that right in this case because his encounter was an investigative detention not a consensual encounter. The State agrees that when an officer approaches an individual without reasonable suspicion that person has the right to ignore the officer's request to speak and go about his business. 460 U.S. at

497-498. Under those circumstances, the person's right to personal security outweighs the government's interest to detect and prevent crime because the consensual encounter relies primarily on the officer's unfettered discretion. Also, there is no standard for the officer to determine if the person is engaged in criminal activity. Therefore, it is only reasonable under the Fourth Amendment to allow a citizen to refuse to cooperate and continue on his or her way. Such a stop is not based on objective criteria and "the risk of arbitrary and abusive police practices exceeds tolerable limits." *See Brown v. Texas*, 443 U.S. 47, 52 (1979). However, unlike the officers in *Brown* and *Royer*, Deputy Dove had reasonable suspicion to detain Hiibel for the crimes of battery and driving while under the influence of alcohol. As a result, the State's interest increases because Deputy Dove had objective criteria to detain Hiibel and could focus on a particular crime or crimes.

The State is not advocating, as Hiibel and amici imply, that an officer should be allowed to arbitrarily detain any or all persons on the street and compel them to identify themselves. Rather, the State is asking this Court to narrowly apply the requirements of NRS 171.123(3) to only those circumstances where an officer has reasonable suspicion that the detained person may be committing a crime as permitted by *Terry v. Ohio*, 392 U.S. 1 (1968).

II.

Requiring an Individual, Lawfully Detained on Reasonable Suspicion, to Identify Himself Does Not Violate the Fifth Amendment Privilege Against Self-Incrimination.

The Fifth Amendment to the United States Constitution states "No person. . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. Const. amend. V. The word "witness" in the constitutional text only applies to the category of compelling incriminating communications to those that are "testimonial" in nature. *See United States v. Hubbell*, 530 U.S. 27, 34-35 n.8 (2000). The history and policies underlying the self-incrimination clause support the proposition that this privilege may only be asserted to resist compelled explicit or implicit disclosures of incriminating information. This privilege was created to prevent the type of inquisitorial methods used by ecclesiastical courts and the Star Chamber wherein an individual would be compelled under oath to answer questions designed to uncover uncharged offenses without evidence from another source. *See Andresen v. Maryland*, 427 U.S. 463, 470-471 (1976); *Doe v. United States*, 487 U.S. 201, 212 (1988). Against this historical backdrop, compelling a lawfully detained individual to identify himself to an officer does not constitute a violation of the Fifth Amendment.

A. Stating your name to an officer during a *Terry* detention is not a testimonial communication.

It is clear in this case that the information law enforcement seeks is compelled. However, it is not evident that the compelled communication is testimonial. In *Doe v.*

United States, 487 U.S. 201 (1988), this Court was asked to decide if a person's signature on consent form authorizing disclosure of foreign bank records was compelled testimony in violation of the Fifth Amendment. In defining the term "testimonial" this Court stated, "to be testimonial the accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Id.* at 210. Applying this definition to the facts of the case, this Court determined that the signed consent form was not testimonial. In reaching this conclusion the Court found that the consent form did not make reference to a specific account and did not acknowledge that an account in a foreign bank existed or was controlled by the petitioner. In addition, the signed consent form did not indicate whether documents or information relating to the petitioner were located at the bank. *Id.* at 214-215. This Court noted that "by signing the form, Doe makes no statement, explicit or implicit, regarding the existence of a foreign bank account or his control over any such account. Nor would his execution of the form admit authenticity of any bank records produced by the bank." *Id.* at 215-216 (citations omitted).

Asking a person, lawfully detained on reasonable suspicion, to state his or her name does not convey information about a crime that will assist the prosecution in uncovering evidence. The name does provide access to information contained in NCIC and public court documents. By analogy, the person is being asked to verbally consent to allow the government to obtain information as part of its investigation instead of signing a written consent form. However, the person is not being asked to confirm, either explicitly or implicitly, prior convictions,

whether he has any outstanding arrest warrants or any involvement in a particular crime. He is only being asked to surrender a key to a strongbox, not produce the effects inside it. 487 U.S. at 210 n.9. As in *Doe*, the prosecution must still locate this information and confirm its validity.

A better analogy to *Doe* may be if the detained person is required to produce an identification card. However, the State is not advocating a national identification card or that a person, lawfully detained on reasonable suspicion, must produce a driver's license. This requirement reduces the person's discretion as to how he or she chooses to comply with NRS 171.123(3). Also, it is more intrusive than merely requiring a person to state their name to an officer. Allowing the person to choose how to comply with this requirement maintains a correct balance between the Fourth and Fifth Amendments.

A person's name is similar to a physical characteristic. It identifies the person like a fingerprint, handwriting exemplar or voice analysis. In regard to these latter examples, this Court has repeatedly held that they fall out of the testimonial purview and therefore are not subject to Fifth Amendment protections. *See Gilbert v. California*, 388 U.S. 263, 266-267 (1967); *United States v. Dionisio*, 410 U.S. 1, 7 (1973). Stating your name is no more testimonial than providing a voice exemplar or handwriting analysis. In *United States v. Wade*, 388 U.S. 218 (1967), Wade was indicted for robbery. Without notice to his attorney, Wade was placed in a lineup and made to wear strips of tape on his face as the robber allegedly had done. Further, he was required to repeat the words used by the robber. Wade was subsequently convicted of robbery but his conviction was reversed by the Fifth Circuit Court of Appeals. This Court granted certiorari and determined

that Wade's Fifth Amendment privilege against self-incrimination was not violated when he was required to speak the same words the robber spoke during the robbery. This Court stated that these spoken words did not have any "testimonial significance" because he was not being asked to disclose any knowledge he had about the robbery itself. 388 U.S. at 222-223.

The same holds true when a person is compelled to state their name. The name itself does not disclose any knowledge of a crime. Providing a name does not require the person to "speak to his guilt." In the instant case, Hiibel's name would not have revealed that he unlawfully struck the woman seated in the car or any other essential element of the crime of battery or domestic battery. His name would not reveal where the battery occurred or even how it occurred. In those instances where compelling a suspect to reveal his name to the officer may result in the suspect's arrest for an outstanding arrest warrant, the right against self-incrimination is still not violated. Though the name may inform the officer that the suspect is wanted for a crime within the jurisdiction or another state, it does not give the officer evidence relating to the essential elements of the alleged crime, does not reveal information that corroborates the essential elements of the alleged crime, nor is it an admission against interest. A person's name carries with it no "testimonial significance" because it does not relate to a factual assertion or disclose information protected by the Fifth Amendment.

In *Pennsylvania v. Muniz*, 496 U.S. 582, 593 (1990) this Court found that the privilege against self-incrimination reflects our unwillingness to subject individuals to the trilemma of self-accusation, perjury or contempt. *Id.* at 595-596. In this regard the Court stated:

> We need not explore the outer boundaries of what is 'testimonial' today, for our decision flows from the concept's core meaning. Because the privilege was designed primarily to prevent 'a recurrence of the Inquisition and the Star Chamber . . . the definition of 'testimonial' evidence articulated in Doe must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the 'cruel trilemma.'

Id. at 596 (citations omitted).

In the case at bar, requiring Hiibel to state his name did not place him in "the cruel trilemma." Hiibel's name was never used against him at trial nor was he placed under oath. *See Chavez v. Martinez*, 123 S. Ct. 1994, 2001 (2003). As a result, Hiibel's privilege against self-incrimination was not violated. However, Hiibel was not totally unprotected. As this Court found in *Doe v. United States*, 487 U.S. 201 (1988), "indeed there are other protections against the governmental efforts to compel an unwilling suspect to cooperate in an investigation, including efforts to obtain information from him. We are confident that these provisions, together with the Self-Incrimination Clause, will continue to prevent abusive investigative techniques." *Id.* at 214. These protections include, the Fourth Amendment, attorney-client privilege, and the Due Process Clause. *Id.* at 214 n.13.

When considering whether compelling an individual, lawfully detained on reasonable suspicion, to state his name violates the Fifth Amendment, this Court should consider the *Doe* Court's sentiments when it stated:

> If the societal interests in privacy, fairness, and restraint of governmental power are not unconstitutionally offended by compelling the accused to have his body serve as evidence that leads to the development of highly incriminating testimony, as *Schmerber* and its progeny make clear, it is difficult to understand how compelling a suspect to make a nonfactual statement that facilitates the production of evidence.

Id. at 213 n.11. Applying these principles, this Court should find that requiring a person detained on reasonable suspicion to state his name does not offend the Fifth Amendment.

B. Stating your name to an officer during a *Terry* Detention is not an incriminating communication.

Historically, the Fifth Amendment privilege against self-incrimination was meant to protect a person from being compelled to state facts that would incriminate him and "answer questions designed to uncover uncharged offenses without evidence from another source." *See Andresen v. Maryland*, 427 U.S. 463, 470-471 (1976). This statement represents an abiding principle in Fifth Amendment jurisprudence but has no application to this case. This Court held in *United States v. Hubbell*, 530 U.S. 27 (2000), that voluntarily created documents were not compelled testimony even though the documents may be incriminating. *Id.* at 35-36. A person's name is a fact that already exists at the time of the stop and is quasi-voluntarily created. Therefore, applying this Court's rationale in *Hubbell*, a person's name should not be considered compelled. Though the name may be incriminating it is not protected

under the Fifth Amendment. In addition, prior to a *Terry* detention the officer has already obtained evidence of a crime from a different source. Therefore, the intent in asking the detained suspect his name is not to get the person to reveal incriminating information about an uncharged offense it is to identify. The suspect is not being asked to reveal where he was at a particular time, if he owns a particular weapon or to explain any evidence obtained by law enforcement. Clearly, asking a person, lawfully detained on reasonable suspicion, to state his or her name is not incriminating.

Hiibel asserts that compelling a person to state his or her name may lead to incriminating evidence. In *Hoffman v. United States*, 341 U.S. 479, 486-487 (1951), the Court announced that the Fifth Amendment extends to answers to questions that would furnish a link in the chain of evidence needed to prosecute the person. This statement was reaffirmed in *United States v. Hubbell*, 530 U.S. 27, 38 (2000). The ruling in *Hoffman* does not apply to this case. Hoffman was asked numerous questions that were more substantive than asking "what is your name?" The questions focused on Hoffman's employment and his relationship to a particular individual. These questions were designed to obtain incriminating information as opposed to finding out his name. In light of *Hoffman*, requiring a person to state his or her name does not compel the type of answer this Court intended to prohibit. Therefore, compelling a person to answer the question "what is your name" does not violate the Fifth Amendment.

In addition, where a person is being asked to provide information, any answer may lead to "other incriminating evidence." For instance, in *Pennsylvania v. Muniz*, 496 U.S. 582, 593 (1990), this Court held that questions

relating to the arrested person's name, address, height, weight, eye color, date of birth and current age could be asked. The Court deemed these to be administrative type questions and not necessarily questions asked to elicit incriminating evidence. *Id.* at 601-602 n.14. Nevertheless, when the arrestee provides his name during the booking process officers will more than likely run a check through NCIC to determine if the name matches the name on any outstanding warrants.

The State does not believe this Court is prepared to hold that an arrestee may refuse to provide his name during the booking process because it may lead to incriminating evidence. Yet the analogy is the same in regard to requiring a lawfully detained person to identify himself to an officer out in the field. As previously argued, one of the purposes of obtaining the suspect's name is to determine whether there are any outstanding warrants or bulletins matching the suspect's name. Though the name may match the information contained in NCIC, this does not necessarily lead to incriminating evidence because the name does not speak to the person's guilt. The prosecution is still obligated to prove that the suspect with this particular name committed the alleged crime. Unlike the answer to the question relating to the suspect's sixth birthday in *Muniz*, a prosecutor can derive no inference from the question "what is your name" as a means to support an element of the crime. To consider the Fifth Amendment privilege against self-incrimination as applying to compelled identification would be engaging in what Justice Holmes has called "an extravagant extension of the Fifth Amendment." *See Holt v. United States*, 218 U.S. 245, 252-253 (1910).

In *Byers v. California*, 402 U.S. 424 (1971), this Court recognized that when there is a question of a compelled

disclosure that has an incriminating potential the judicial scrutiny is invariably a close one. *Id.* at 427. This Court also noted that in an organized society many burdens are placed upon its citizens to provide information that may result in some future prosecution and that the "mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure. . . ." *Id.* at 427-428. Furthermore, providing identification is "essentially a neutral act." *Id.* at 432.

As in *Byers*, requiring a lawfully detained person to identify himself may result in a future prosecution. However, this has the same effect as being compelled to leave your name and address at the scene of a vehicle accident. "It identifies but does not by itself implicate anyone in criminal conduct." 402 U.S. at 433-434. Stating your name to an officer is essentially a neutral act. Though it may ultimately lead to an arrest and conviction, these events rely on other factors and independent evidence. *Byers*, 402 U.S. at 434. Therefore, requiring a lawfully detained person to identify himself cannot be deemed to be a violation of the privilege against self-incrimination.

C. *Miranda* does not apply in this context.

Another concern that may apply to the peripheral issues surrounding the Fifth Amendment privilege against self-incrimination, is to what extent *Miranda v. Arizona*, 384 U.S. 436 (1966), may play a role in this investigative encounter. Generally speaking, a *Miranda* warning is not required during a *Terry* investigation. *See Berkemer v. McCarty*, 468 U.S. 420, 439-440 (1984). Under the facts of this case, *Miranda* has no applicability and should not be a consideration by this court. In *Miranda*, the Court

extended the protections against self-incrimination to custodial interrogation by the police. 384 U.S. at 460-461, 467. However, this Court has also recognized that the requirements of *Miranda* only apply when a person is placed into custody where there is a formal arrest or restraint of freedom of movement of the degree associated with a formal arrest. *See Oregon v. Mathiason*, 429 U.S. 492, 494-495 (1977).

In the case at bar, there are no facts to suggest that Hiibel was in custody prior to Deputy Dove's request that he identify himself. As long as the investigative encounter does not rise to the level of a formal arrest, a *Miranda* warning prior to asking a lawfully detained suspect to identify himself is not required. Furthermore, it is difficult to imagine that asking "what is your name" is a question that is reasonably likely to elicit an incriminating response from the suspect. *See Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

D. Stating your name is not the same as stating facts about a crime.

This Court explained the purpose and policies behind the privilege against self-incrimination in *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964), as quoted in *Doe v. United States*, 487 U.S. 201, 212-213 (1988):

> our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and

> abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' . . . ; our respect for the inviolability of the human personality and of the right of each individual 'to private enclave where he may lead a private life,' . . . ; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often a 'protection to the innocent.'

Id. at 212-213.

These policies are served when the privilege against self-incrimination is asserted to prevent the suspect from having to reveal his knowledge of facts relating him to a crime or compelling him to share his thoughts and beliefs with the government. *See Doe v. United States*, 487 U.S. 201, 213 (1988). Requiring a person, lawfully detained on reasonable suspicion, to identify himself does not violate these principles and policies of the privilege against self-incrimination. It does not lead a person to reveal knowledge of incriminating facts. The balance between state and individual is carefully crafted by the requirement that the person must be lawfully detained and is only required to provide his name. As a result, NRS 171.123(3) does not violate the privilege against self-incrimination and should be deemed constitutionally valid.

Interestingly, when addressing the Fifth Amendment, Hiibel cites to Justice White's concurring opinion in *Terry v. Ohio*, 392 U.S. 1 (1968), to support his argument that a lawfully detained person cannot be compelled to identify

himself. (Hiibel's Brief p. 15). This Court's opinion in *Adams v. Williams*, 407 U.S. 143 (1972), sheds some light on what Justice White may have meant when he stated in *Terry* that "it seems to me the person may be briefly detained against his will *while pertinent questions* are directed to him. Of course the person stopped is not obligated to answer, answers may not be compelled and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. . . ." *Id.* at 34-35 (emphasis added).

Justice White was part of the majority in *Adams* and made no comment nor refuted the statement that one of the purposes of *Terry* was to determine the detained person's identity. This omission seems to imply that when Justice White used the term "pertinent questions" he was more concerned about compelling a detained person to answer questions relating directly to a crime being investigated and not questions such as "what is your name?" This interpretation is supported by a footnote from the majority's opinion in *Davis v. Mississippi*, 394 U.S. 721, 727 n.6 (1969), and also referenced in Hiibel's brief. (Hiibel's Brief p. 14-15). *Davis* was decided a year after *Terry* and in it the Court reiterated its position regarding compelling an individual to answer questions during the course of an investigation. In footnote six (6) the majority made it clear that "police have the right to request citizens to answer voluntarily *questions concerning unsolved crimes* they have no right to compel them to answer." 394 U.S. at 727 n.6 (emphasis added).

Asking a person "what is your name?" does not fall within the meaning of "questions concerning unsolved crimes." It is a generic question that is substantially different from a question relating to a particular crime.

Respondent asserts that when reading Justice White's concurring opinion in *Terry* in context with this court's statements in *Adams* and *Davis*, it does not appear that he would find compelling a person to identify himself during an investigative detention to be a violation of the Fifth Amendment.

Hiibel also cites Justice Brennan's dissenting opinion in *Michigan v. DeFillippo*, 443 U.S. 31, 44 (1979), as support for his assertion that Deputy Dove violated his right against self-incrimination. (Hiibel's Brief p. 15). Hiibel's reference actually clarifies and supports the State's position on these issues. The most pertinent part of Justice Brennan's dissenting opinion states "while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Id.* at 44-45.

Deputy Dove's request for identification did not constitute a question concerning the battery, DUI or any other unsolved crime. The request for identification did not ask whether Hiibel was driving the truck while under the influence of alcohol or whether he struck the woman sitting inside the truck. Hiibel has failed to demonstrate that the request for identification constitutes a violation against his right of self-incrimination. The cases cited by both Hiibel and the State support one conclusion, requiring a lawfully detained person to identify himself is not a violation of the Fifth Amendment privilege against self-incrimination.

CONCLUSION

In light of the arguments presented herein, this Court should affirm the decision of the Nevada Supreme Court and find that the requirements of NRS 171.123(3) do not violate the Fourth and Fifth Amendments to the United States Constitution.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT AND THE HONORABLE RICHARD A. WAGNER,

Respondents,

and

THE STATE OF NEVADA,
Real Party in Interest.

On Writ of Certiorari to the Supreme Court of Nevada

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I. COMPELLING A PERSON DETAINED UPON REASONABLE SUSPICION[1] TO IDENTIFY HIMSELF TO THE POLICE VIOLATES THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION.[2]

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[1] An erroneous factual assumption has unfortunately made its way into this case, namely, that Mr. Hiibel's teenage daughter was the passenger and that Mr. Hiibel was driving. The trier of fact made no such finding, nor does the evidence support such a finding. *See*, *e.g.*, Defendant's Exhibit A (6 minute videotape of incident), Justice Ct. Tr. Trans. Vol. II, Feb. 13, 2001, at 21; and Trooper Merschel's testimony that Mr. Hiibel indicated he was not driving, Justice Ct. Tr. Trans. Vol. I, Nov. 7, 2000, at 11. The Justice of the Peace who was the factfinder in this case found only that the female was in the cab of the truck, not that she was the passenger. J.A. at 4. On appeal before the district court the focus was on the officer's investigation of an alleged domestic battery, not a drunk driving situation. Dist. Ct. App. Trans., June 18, 2001, at 4, 21.

The first erroneous reference to this being an alleged drunk driving situation is the district court's order on appeal, even though the court's initial recitation of the facts makes no reference to Mr. Hiibel being the driver. J.A. at 10-12. Mr. Hiibel was neither tested nor arrested for drunk driving. The district court appears to have engaged in after-the-fact justification for the officer's actions and its characterizations should be given no weight before this Court. *Cf. U.S. v. Brignoni-Ponce*, 422 U.S. 873, 887 n.11 (1975) (declining to give any weight to after-the-fact justification for a stop). Unfortunately, erroneous assumptions about Mr. Hiibel's daughter being the passenger and him the driver made their way into the Nevada Supreme Court's opinion and some of the briefs filed in this Court. J.A. at 15-16; Pet. Br. at 4, 23 n.7; Resp. Br. at 8, 25, 29; *Amicus* U.S. Br. at 2; *Amicus* CJLF Br. at 2, 6, 17, 19; *Amicus* Cato Inst. Br. at 1, 2; *Amicus* ACLU Br. at 1. The trier of fact's findings should be relied upon when the facts are in dispute. *See*, *e.g.*, *Florida v. Bostick*, 502 U.S. 429, 431-32 (1991).

This case did not initiate as a traffic stop nor has it been treated as such. Regardless, the parties are in agreement that Deputy Dove was investigating an alleged battery or domestic battery, and thus agree that he was acting on reasonable suspicion when he approached Mr. Hiibel. Thus, the issue before this Court remains unchanged: whether the Constitution prevents the state from compelling people to identify themselves during a police investigation when they have been seized upon less than probable cause.

[2] Mr. Hiibel refused to identify himself because he did not feel the police officer had the right to compel that information. To the extent the

A. Being Compelled To Identify Oneself To The Police Is A Testimonial Communication Protected By The Fifth Amendment.

Respondent claims that stating one's name during a *Terry* stop is non-testimonial and therefore does not violate the Fifth Amendment. Resp. Br. at 30-35. In *Doe v. U.S.*, 487 U.S. 201 (1988), this Court recognized that, "in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Id.* at 210 (footnote omitted). A simple way to comprehend the difference between testimonial and non-testimonial evidence is to ask whether the person could lie in response to the question posed. George Fisher, *Evidence* 800 (2002).

Applying these definitions, NRS 171.123(3) compels testimonial communication from a suspect when it requires him to identify himself to an investigating officer. Giving one's name is an explicit assertion of a fact which discloses information, namely, one's identity.[3] One could lie in

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government claims he did not properly preserve his Fifth Amendment argument (*Amicus* U.S. Br. at 28, n.13), counsel at trial did argue *Berkemer v. McCarty*, 468 U.S. 420 (1984), a Fifth Amendment case. Justice Ct. Tr. Trans. Vol. II, February 13, 2001, at 22-24. Moreover, the Fifth Amendment argument was raised during the course of the appeal to the district court and the State never argued that the issue was not properly before the court. *See* App. Br. on Appeal, May 4, 2001, at 1, 3, 4; Resp. Ans. Br., May 9, 2001, at 2; App. Reply Br., May 14, 2001, at 1-3; Dist. Ct. Trans. on Appeal, June 18, 2001, at 7, 10, 23. Finally, the Fifth Amendment argument was raised before the Nevada Supreme Court. *See* Pet. for Writ of Cert., Dec. 4, 2001, at 7-11; Pet. for Rhg. Jan. 7, 2003, at 1-4. Therefore Petitioner submits that this issue is properly before this Court.

[3] Although respondent suggests the defendant can choose how to comply with the identification requirement, Resp. Br. at 32, the facts of this case are otherwise: Deputy Dove demanded Mr. Hiibel's identification, not merely his name. Justice Ct. Tr. Trans. Vol. II, February 13, 2001, at 15.

response to a question about one's name. The only logical conclusion which can be drawn is that identifying oneself to a police officer is testimonial.

Respondent tries to analogize the production of one's name to instances where this Court has approved compelled production of physical evidence to reveal some aspect of one's identity, such as blood samples, *Schmerber v. California*, 384 U.S. 757, 760-65 (1966); handwriting exemplars, *Gilbert v. California*, 388 U.S. 263, 266-67 (1967); or voice exemplars, *U.S. v. Dionisio*, 410 U.S. 1, 6-7 (1973). However, even in instances requiring the defendant to speak, it is only the physical properties of the evidence, *i.e.*, the sound of one's voice, which may be used: the content of the exemplar may not be used as proof of a crime. *Gilbert*, 388 U.S. at 266-67. Moreover, identity based on that physical evidence is ultimately determined by a third party. The cited instances involve non-communicative acts which produced physical evidence not protected by the Fifth Amendment and are therefore inapposite.[4]

When compelling a person to identify himself to an investigating officer, it is the content of the communication which is significant, not the manner of its delivery. Unlike the cases relied on by respondent, in cases such as this one involving compulsory identification, the person himself is required to provide the basis for determining his identity. Moreover, the officer would be allowed to testify in court regarding the content of the person's communication under

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[4] More importantly, contrary to the assertion that "producing an identification . . . raises no Fifth Amendment concerns," (*Amicus* U.S. Br. at 24), compelling a person to identify himself by providing a credential is as violative of the Fifth Amendment as compelling him to speak his name. *See Fisher v. U.S.*, 425 U.S. 391, 409-10 (1976); *Id.* at 428, 432 (concurring opinions); *Boyd v. U.S.*, 116 U.S. 616, 633-35 (1886).

Nev. Rev. Stat. 51.035(3)(a). Consequently, a compelled revelation of one's identity is a testimonial communication because it explicitly relates factual information whose substantive content can be used against the accused in court and is thus protected by the Fifth Amendment.

B. Identifying Oneself To A Police Officer During A *Terry* Stop Is An Incriminating Communication.

Respondent claims that giving one's name is essentially neutral and thus not incriminating. Resp. Br. at 35-42; *Amicus* U.S. Br. at 16-24. This claim ignores the realities of the criminal law and the facts of this case. One's name can be incriminating and aid in a criminal prosecution. For example, in Nevada the existence of a familial-type relationship is a necessary element of domestic battery and triggers greater punishments than ordinary battery. Nev. Rev. Stat. 33.018. The foundation for determining that relationship begins with one's name. In addition, the domestic battery laws are recidivist statutes which carry increasing punishments for repeat offenders. Nev. Rev. Stat. 400.485. Repeat felony offenses can lead to punishment as a habitual criminal, which carries a maximum penalty of life without the possibility of parole. Nev. Rev. Stat. 207.010(1)(b)(1), 207.016. Thus, in some instances a person's name, matched with the prior record associated with that name, can be used to enhance the penalty from a misdemeanor to a felony. Moreover, identifying oneself as someone under a restraining order against domestic violence can itself lead to criminal sanctions. Nev. Rev. Stats. 33.100, 125.560.

The privilege against compulsory self-incrimination "extends not only 'to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute.'" *Ohio v. Reiner* , 532 U.S. 17, 20 (2001) (quoting *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951)). As respondent and its *amici* admit, the name is queried against a vast government database of information to determine if the suspect is wanted or dangerous. Resp. Br. at 17, 21; *Amicus* U.S. Br. at 13-15; *Amicus* NAPO Br. at 7-8; *Amicus* CJLF Br. at 26. Thus, the name furnishes not only a link, it is the very first link in the evidentiary chain of domestic violence laws, from which multiple negative consequences can ensue against the person whose identity has been compelled. To say that the use of one's name is not incriminating or is neutral information is belied by the realities of this case.

Further, respondent and its *amici* assert that knowledge of the identity of the suspect will aid in apprehending criminals. Resp. Br. at 16, 17, 20-24; *Amicus* U.S. Br. at 15, 16; *Amicus* CJLF Br. at 26-28; *Amicus* NAPO Br. at 13-18. The government cannot have it both ways. If indeed a person's name aids the government in enforcing the criminal laws and obtaining convictions, then the name must, by definition, be incriminating. If it were not, why would the government have any interest in making it a crime to fail to identify oneself?[5]

C. Nevada's Compulsory Identification Requirement Is Violative Of The Fifth Amendment.

Respondent and its *amici* attempt to utilize the rationale of *California v. Byers*, 402 U.S. 424 (1971), and *Baltimore City Dep't of Soc. Serv. v. Bouknight*, 493 U.S. 549 (1990), to claim that the Fifth Amendment does not protect against compulsory identification by the authorities. Resp. Br. at 38;

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[5] The state has the power to "escalate completely innocent conduct into a felony." *Brogan v. U.S.*, 522 U.S. 398, 411 (1998) (Ginsburg, J., concurring). This is particularly disquieting since innocent acts can properly be the basis for reasonable suspicion. *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). A law which requires one to identify oneself upon demand or face arrest reverses the presumption of innocence so fundamental to our system of justice. *See Amicus* PrivacyActivism ("PA") Br. at 5.

Amicus U.S. Br. at 18, 20, 27; *Amicus* NAPO Br. at 20-23; *Amicus* CJLF Br. at 11. The holdings of these cases are not applicable to Nev. Rev. Stat. 171.123(3), as made abundantly clear in *Bouknight*: "the ability to invoke the privilege may be greatly diminished when invocation would interfere with the effective operation of a generally applicable, civil regulatory requirement." 493 U.S. at 557 (citation to *Byers* omitted); *see also U.S. v. Hubbell*, 530 U.S. 27, 35 (2000) ("The fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege") (footnote omitted). Nev. Rev. Stat. 171.123(3) is not a generally applicable civil regulatory requirement. The cited cases are therefore factually distinguishable.

Unlike the statutes in *Byers* and *Bouknight*, Nev. Rev. Stat. 171.123(3) only comes into play during a *Terry* stop, which by definition is a criminal investigation. Persons who are not suspected of a crime are not subject to arrest under Nevada law for refusing to identify themselves to the police.[6] Thus, the law applies to an area of activity permeated with criminal statutes and is directed only at persons suspected of criminal activities. Moreover, as demonstrated above, the statute poses a substantial hazard of self-incrimination. Consequently, under the analytical framework of *Byers*, Nev. Rev. Stat. 171.123(3) is violative of the Fifth Amendment.

Contrary to the assertion that the issue is really a matter of "when—rather than whether—officers can learn" of a person's identity, *Amicus* U.S. Br. at 23, the central issue is whether an officer can compel identification even though the

[6] Moreover, if, as respondent argues, compelling identity aids officer safety in determining via government databases whether the suspect is wanted or dangerous, Resp. Br. at 17, 21, this in itself facilitates criminal prosecutions.

officer lacks probable cause to arrest. If, as respondent asserts, prosecution of the person would require development of evidence obtained through independent investigation, Resp. Br. at 38; *Amicus* U.S. Br. at 21-22, 25, then the government should be required to rely on that evidence rather than requiring the suspect to provide the first link in the evidentiary chain. Holding the government to its traditional evidentiary burden while at the same time respecting the individual privilege against compelled self-incrimination yields a fair and just result consistent with the Fifth Amendment.

D. The Fifth Amendment Is Not Subject To Weighing Analysis.

Amici U.S. and NAPO suggest that the Fifth Amendment privilege is not absolute and must yield to other important interests such as officer safety, crime prevention, and the logistics of routine police work. *Amici* U.S. Br. at 24-27; NAPO Br. at 23-25. Such an argument overlooks the fact that the privilege is not subject to a weighing analysis like the Fourth Amendment. *See, e.g.*, *California v. Byers*, 402 U.S. at 430. The bar of the Fifth Amendment is absolute, *New Jersey v. Portash*, 440 U.S. 450, 459, 463 (1979) (balancing is not merely unnecessary, it is "impermissible"), and its strictures are not removed by showing reasonableness. *Fisher v. U.S.*, 425 U.S. 391, 400 (1976); *Dickerson v. U.S.*, 530 U.S. 428, 452-55 (2000) (Scalia, J., dissenting) (privilege prohibits any criminal trial use of involuntarily compelled statements "since the Fifth Amendment's bar on compelled self-incrimination is absolute"). Balancing is therefore inapplicable.

E. Nevada's Statutory Scheme Is Facially Unconstitutional Under the Fifth Amendment and a Case-By-Case Approach is Inappropriate.

Amicus U.S. argues that if the Court were to find that the Fifth Amendment privilege permits individuals to refuse to comply with Nevada's identification requirement, "the proper course would be to leave for case-by-case resolution whether assertion of the privilege" is valid, rather than holding the statutory scheme facially unconstitutional. *Amicus* U.S. Br. at 27.

Analysis of the system advocated by the U.S. quickly yields an absurd outcome. Under a case-by-case rule, only persons who legitimately fear that disclosure of their names to officers will incriminate them may properly refuse to answer an identification demand by law enforcement. Innocent persons, not having incriminating identities, may not refuse. For example, suppose an officer sees two persons standing near a home which is known to the officer to be the site of a recent domestic dispute. Reasonably suspecting a restraining order violation, the officer approaches the two and demands identification pursuant to Nev. Rev. Stat.171.123(3). If the first person, who is until now innocent of any crime, refuses, he can be arrested and convicted under Nev. Rev. Stat. 199.280. The second person has a restraining order against his presence near the house, does not identify himself, and is also arrested. However, his conviction under Nev. Rev. Stat. 199.280 is precluded, because his name is precisely the "link in the chain of evidence needed to prosecute" him for violating a restraining order and thus could not legitimately be compelled by the officer. *Ohio v. Reiner*, 532 U.S. at 20. Thus, under a case-by-case system, innocent persons who choose to remain silent will be arrested and convicted, and persons whose names are incriminating must be exempted

from complying with the statute.[7] As the Court noted in *Sherman v. U.S.*, "[t]he function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime." 356 U.S. 369, 372 (1958). The case-by-case "solution" fails as innocent persons would be convicted, while guilty persons go free.

II. REQUIRING *TERRY* STOPPED INDIVIDUALS TO IDENTIFY THEMSELVES VIOLATES THE FOURTH AMENDMENT PROHIBITION AGAINST UNREASONABLE SEARCHES AND SEIZURES.

A. A Person Has A Privacy Interest In His Name.

Amicus U.S. claims there is no legitimate expectation of privacy in one's name. *Amicus* U.S. Br. at 8-12. This claim is unfounded.

[7] A side effect of such a case-by-case rule is the quagmire of litigation that will undoubtedly result. Innocent persons who would otherwise never encounter the judicial system will have to contend with criminal proceedings for remaining silent. The vast majority of people who are *Terry*-stopped are never arrested. *See, e.g.*, Casimir, Minority Men: *We Are Frisk Targets*, N. Y. Daily News, Mar. 26, 1999, p. 34; Goldberg, *The Color of Suspicion*, N. Y. Times Magazine, June 20, 1999, p. 85. These data indicate that society is paying a significant cost in infringement on liberty by these virtually random stops. *Illinois v. Wardlow*, 528 U.S. 119, 135 nn.7-8 (2000).

Similarly, persons with incriminating names will have every incentive to challenge compulsory identification requirements. For example, if in the example above the person with the restraining order complied with Nev. Rev. Stat. 171.123(3), he would be able to challenge his resulting conviction for violating the restraining order on grounds that his compelled, incriminating identification would have to be suppressed as violative of the Fifth Amendment. *Nix v. Williams*, 467 U.S. 431, 442 n.3 (1984); *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 79 (1964); *Kastigar v. U.S.*, 406 U.S. 441, 460-61 (1972). In short, it does no good to obtain evidence via a compelled identification because to do so would result in the suppression of that evidence.

A name is a highly significant, particularly personal piece of information that most individuals do not readily reveal to strangers except for good reason. The core purpose of the Fourth Amendment is to "protect personal privacy and dignity against unwanted intrusion by the State," *Schmerber v. California*, 384 U.S. 757, 767 (1966), and thus protects "people, not places. What a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz v. U.S.*, 389 U.S. 347, 351 (1967); *cf. Bond v. U.S.*, 529 U.S. 334, 338-39 (2000). The essential protection of the Fourth Amendment extends "wherever an individual may harbor a reasonable 'expectation of privacy,'" *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (citation omitted), because the rights of privacy and personal security are "of the very essence of constitutional liberty." *Harris v. U.S.*, 331 U.S. 145, 150 (1947).

That one has a reasonable expectation of privacy in one's name is supported by the long and worthy tradition of anonymity which was key to the founding of this country. The Federalist Papers were written by James Madison, Alexander Hamilton, and John Jay under the *nom de plume* "Publius." The Federalist Papers (Clinton Rossiter, ed., 1961). The Federalist Papers sought to convince states to ratify the Constitution, which was ratified in 1788, and predated the ratification of the Fourth Amendment in 1791. As James Madison's draft of the Fourth Amendment was ultimately ratified, it is abundantly clear that the Framers contemplated a strong anonymity component within the privacy protected by the Fourth Amendment. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 555 (1999).

As Justice Brandeis famously observed, the Fourth Amendment embodies an individual's "right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. U.S.*, 277 U.S. 438, 478

(1928) (Brandeis, J., dissenting). *Cf. Chicago v. Morales*, 527 U.S. 41, 53-54 (1999).

In this digital era, to hold that there is no right of privacy in one's name would be tantamount to saying that no right of privacy exists at all and that all federal laws regulating the use of personal information do not relate to an individual's privacy. As the government has and is accumulating large identification schemes and electronic data banks[8] of information on its citizens, an officer who has compelled a suspect to divulge his name can learn, within a matter of seconds, incredibly detailed information about that person. Such information goes far beyond that which might assist in officer safety, and is equivalent to exploring the contents of his file cabinets, personal history, and family diary, essentially an individual's "papers" as originally contemplated by the Fourth Amendment.

Amicus U.S. relies on cases involving physical evidence exposed to public observation, such as trash, open fields, driving on public roads, and the tone of one's voice[9]—and are thus distinguishable. *Amicus* U.S. Br. at 8-10. A name is neither a physical characteristic[10] nor is it exposed to the public at large, as it has not yet been tattooed on our

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[8] Detailed information about systems such as NCIC, NLETS, MATRIX, DAVID, TWIC and US-VISIT can be found at Pet. Br. at 24 n.9; Resp. Br. at 5, 21-22; and *Amicus* EPIC Br.

[9] *See, e.g., U.S. v. Dionisio*, 410 U.S. 1, 9 (1973); *U.S. v. Mara*, 410 U.S. 19, 21 (1973).

[10] Moreover, not all physical characteristics are considered beyond the purview of the Fourth Amendment. Nail scrapings, X-rays, and pubic hair samples have been held to enjoy Fourth Amendment protection. *See, e.g., Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (fingernail scrapings); *U.S. v. Vega-Barvo*,729 F.2d 1341 (11th Cir.) (X-rays), *cert. denied*, 469 U.S. 1088 (1984); *Bouse v. Bussey*, 573 F.2d 548 (9th Cir. 1977) (pubic hair). It makes no sense to suggest that intimate non-physical attributes of a person's identity, such as a name, could receive less protection under the Fourth Amendment than physical characteristics.

forearms. Unlike a physical characteristic, such as one's handwriting or voice, a stranger cannot divine one's name from mere observation. People do not generally walk down the street wearing name tags or shouting their names. Instead, they jealously guard their identity, in numerous ways, for a variety of reasons. People typically keep identity credentials to themselves, secured in purses or wallets, if they elect to carry credentials at all.

Although people may reveal their names as a matter of course in everyday social or business interactions, such as introducing oneself at a party or using a check or credit card to make a purchase, these are examples of voluntary disclosure, made to a limited number of people, for a particular purpose. A person may elect to provide a stranger with only his first name, a nickname, or even a false name, for a variety of reasons. For example, a person in group therapy may identify himself only by a nickname; a person meeting a new casual acquaintance may give only a first name; another might give a false name to fend off an unwanted suitor.

Moreover, there are numerous instances in which people choose not to reveal their identities but to remain anonymous. This may be to prevent political retribution, as in the case of the Federalist Papers or the Civil Rights Movement, or out of a concern for personal privacy as in the case of paying cash at a movie or motel, or having an unlisted telephone number with caller ID blocking. Refusing to identify oneself to an intrusive stranger is considered just plain common sense. Children are routinely warned not to talk to strangers. In judicial proceedings, minors' names are routinely referred to by initials only. We are all cautioned not to reveal personal information in order to avoid harassment and identity theft.[11]

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[11] Contrary to the suggestion that a *de facto* national ID system is already in place, *Amicus* CJLF Br. at 15, mandatory identification laws are neither on the books nor consistent with traditional social mores, wherein revealing one's identity is done on a strictly voluntary basis for social or business reasons. Pedestrians are not required to carry identification. In addition, many homeless people are unable to obtain or keep identification. *Amicus* NLCHP Br. at 14-15, 26-28.

Unlike the physical evidence at issue in *U.S. v. Dionisio*, 410 U.S. 1, 15 (1973), which "involves none of the probing into an individual's private life and thoughts that marks interrogation and search" (quoting *Davis v. Mississippi*, 394 U.S. 721 (1969)), demanding one's name probes directly into one's mind. How more deeply can the government delve into one's private life and thoughts than to compel revelation of one's name and search vast data banks for information regarding one's private life? Intruding upon the contents of the mind to obtain one's name is akin to being "compelled to reveal the combination to his wall safe." *Doe v. U.S.*, 487 U.S. at 219 (Stevens, J., dissenting), *see also id.* at 210 n.9 (majority opinion). In sum, one's name is at the very core of an individual's privacy.

B. Nevada's Statutory Scheme Undermines The Probable Cause Standard

Respondent correctly identifies that a practice's acceptance as reasonable at common law can bear heavily on whether or not that practice is violative of the Fourth Amendment. However, respondent incorrectly asserts that a compulsory identification requirement would have been reasonable under the common law. Resp. Br. at 9-11. The text of the Fourth Amendment makes no reference to reasonable suspicion. Thus, examples relied on by respondent are inherently suspect because they involve warrantless arrests based on probable cause.

The "whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority." *Rice v. Connolly*, 2 Q.B. 414, 419 (C.A.1966). At the time of the Framers, common law did not recognize any broad power of the police to detain "suspicious" persons.

Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 629 n.216 (1999). Three narrow exceptions to this rule existed, however: (1) preventing an incipient affray; (2) detaining a person who had inflicted a grave wound to determine whether the victim would live or die; (3) dissuading nightwalking, which was "viewed almost as an offense in its own right." *Id.* None of these exceptions applies to the facts of this case.

Moreover, to the extent the "stop" portion of the *Terry* standard has historical antecedents in nightwalker statutes, Mr. Hiibel was stopped, *i.e.*, seized, when Deputy Dove detained him upon reasonable suspicion of a battery; Dove's repeated demands for identification amounted to an unreasonable search not supported by probable cause. This does not comport with the common law understanding that one has the right to refuse to answer questions put to him by persons in authority. The Framers of the Constitution would have considered it an indignity under the common law to be subjected to compelled identification upon mere suspicion of a crime.[12]

C. The Significant Intrusion On An Individual's Constitutionally Protected Rights Is Not Outweighed By The Government's Interests.

Petitioner identifies numerous constitutional rights which are significantly impacted by Nevada's compulsory identification scheme. Pet. Br. at 36. Respondent and its *amici* counter that officer safety and enhanced crime prevention outweigh such concerns. In determining the weight of the parties' respective positions, however, it is important to

[12] Irrespective of whether the Framers contemplated or condoned compulsory identification of suspicious persons, it is impossible to believe that they would have found such demands reasonable in light of modern database technology and the expansive amount of information which is immediately accessible to field officers as a result. *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993).

remember that "the majority of *Terry* detainees who give their names will never be arrested, never be charged with a crime, and never be prosecuted in a criminal case." *Amicus* NAPO Br. at 24. Thus, when balancing the rights of *Terry* detainees against any claimed governmental interest, it is important to consider that the majority of these individuals have been confronted by the police and placed under an unnerving and embarrassing shadow of suspicion for merely appearing out of the ordinary or otherwise innocently drawing the attention of a police officer.

Moreover, public safety includes protection of citizens' constitutional rights: the public interest is served not only by effective law enforcement but also by safeguarding individual freedoms and privacy from arbitrary governmental interference.

1. *Assertions that Requiring* Terry *Subjects to Identify Themselves Will Increase Police Officer Safety are Unsupported.*

Respondent and its *amici* argue that police safety will be enhanced by requiring the subjects of *Terry* stops to identify themselves. Resp. Br. at 17-20, *Amicus* U.S. Br. at 13-16, *Amicus* NAPO Br. at 4-10. To support its position, *Amicus* NAPO cites several statistics which confirm that police work can be dangerous. *Id.* at 5. Extrapolating these statistics, NAPO claims that implementing compulsory identification during *Terry* stops would significantly enhance officer safety. While attempting to improve officer safety is a laudable goal, a conclusion that mandatory identification promotes such safety is speculation.

The Federal Bureau of Investigation (FBI) compiles annual statistics on law enforcement officers who were killed or assaulted in the line of duty, whether feloniously or accidentally. U.S. Dept. of Justice, *FBI's Law Enforcement Officers Killed and Assaulted*, 2000. In 2000, the year in which the

instant offense occurred, 8,653 agencies contributed data including narrative descriptions of the incidents in which police officers were killed. *Id.* at 43-56. In almost none of these instances would death have been averted if compulsory identification under *Terry* had been adopted. In the few unclear cases, the effect of compulsory identification on the officer's life remains debatable.[13] Moreover, the vast majority of detainees, even ones who have been given *Miranda* warnings, provide identification upon request. *Amicus* PA Br. at 26.

Though at first blush it may seem strange, a sound argument can be made that compulsory identification could lull officers into a false sense of security, and potentially subject them to greater danger than when identity may not be compelled. *Amicus* NAPO's suggestion that officers would alter their behavior toward the detainee, "if, say, the answer to their question is 'John Dillinger' as opposed to 'Dr. Billy Graham'" underscores the problem. *Amicus* NAPO Br. at 9. Dangerous, wanted individuals will undoubtedly supply false names to officers during a *Terry* encounter if they are compelled to give names. Upon hearing the name, "Billy Graham," and confirming that Dr. Graham is not known to be a dangerous individual, a field officer may relax his guard, potentially subjecting himself to a greater threat. Officers should treat *all* suspects who are unknown to them with the same degree of caution as suspects with a known criminal record.[14]

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[13] In the past decade, there were approximately 10.5 cases per year of death during *Terry* stops. *Amicus* NAPO Br. at 5. In some cases there was still injury even when ID was provided.

[14] Not only is this important to officer safety, but may well be essential to public safety as well. If an officer receives a benign name from a person exhibiting mildly suspicious behavior, that officer may more readily accept an explanation of a suspect's intent than would otherwise be warranted if the officer had to rely on his own senses, experience, and investigative skills to determine whether a person posed a threat.

Similarly, officers may become so engrossed in determining a suspect's identity during a *Terry* stop that they neglect to conduct standard and well-tested fieldwork as a result. Defendant's Exhibit A video discloses that Deputy Dove never in fact investigated the alleged battery of Petitioner's daughter. He did not frisk Petitioner, nor did he handcuff him until the time he arrested Petitioner. Instead, he spent several minutes demanding identification and refusing to explain to Petitioner why he wanted that identification. The law already provides Deputy Dove very strong tools to help protect himself when conducting investigations in the field. Any argument that he requires more power, especially when he plainly isn't sufficiently concerned about his safety to conduct a pat down, is specious.

2. *Mandatory Identification During A* Terry *Stop Will Not Significantly Enhance Police Ability To Fight Crime.*

Petitioner has never asserted that the police should not be able to ask a person's identity during a *Terry* stop. Instead, Petitioner asserts that the police may not arrest a person for refusing to identify himself. It is government compulsion, by threat of imprisonment, which makes the identification repugnant to the Constitution. The vast majority of persons subjected to a field stop voluntarily answer questions posed to them by officers. *Amicus* PA Br. at 26. Thus, the potential crime prevention benefits extolled are only applicable against those few people who choose to remain silent.

Petitioner has already pointed to results sanctioned by *Amicus* U.S. under which innocent persons may be convicted for failing to identify themselves to officers, but guilty persons may not. How can incarcerating the otherwise innocent while letting the guilty go free aid effective law enforcement?

Finally, it is asserted that if a police officer is allowed to identify a *Terry* detainee, then that person will be deterred

from committing a crime. U.S. Br. at 15. "Public safety" includes protecting citizens' rights against governmental encroachment. The public interest is served not only by effective law enforcement, but also by safeguarding individual liberties. As Justice Stewart explained, "[t]he inevitable result of the Constitution's prohibition against unreasonable searches and seizures . . . is that police officers who obey its strictures will catch fewer criminals. That is not a political outcome impressed upon an unwilling citizenry by unbeknighted judges. It is the price the framers anticipated and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power."[15]

3. *Adoption of a Compulsory Identification Scheme Will Have a Chilling Effect on the Exercise of Important First Amendment Rights*

Amicus U.S. suggests that because "there is no indication that petitioner was engaged in expressive activity when he was detained, this case does not implicate any interest in anonymous speech."[16] *Amicus* U.S. Br. at 16. Using such reasoning, one could just as easily assert that officer safety is not implicated by this case because at no time during his encounter with Petitioner was Deputy Dove's safety in jeopardy. The assertion that the First Amendment is not implicated belies what little weight the government gives to personal liberties when attempting to balance those liberties against its own interests.

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[15] Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L. Rev. 1365, 1393 (1983).

[16] In a similar vein, although the claim that Mr. Hiibel has abandoned any vagueness challenge is perhaps overstated (*Amicus* CJLF Br. at 6-7), should the Court wish to address vagueness Mr. Hiibel requests that the parties be permitted to submit supplemental briefs on that issue.

Compulsory identification presents a very real threat to the exercise of First Amendment rights. Pet. Br. at 36-42; *Amicus* PA Br. at 10-12. *Amicus* NAPO's assertion that First Amendment jurisprudence protects a speaker's "anonymity from his potential audience, not from proper regulatory authorities such as police departments," *Amicus* NAPO Br. at 26, is unsupported and alarming. Free movement on public streets is well recognized as an essential component of engaging in many First Amendment activities. Many *Terry* encounters may involve persons who are on their way to participate in protected activities, especially in the case of picketing, during which a *Terry* detainee may be engaged in First Amendment activity at the time of the stop. *See, e.g., Graves v. City of Coeur D'Alene*, 339 F.3d 828 (9th Cir. 2003).

As explained in *NAACP v. Alabama ex rel. Patterson*, "it is hardly a novel perception that compelled disclosure of affiliation with groups in advocacy" may impermissibly restrain the freedom of association. 357 U.S. 449, 462 (1958). It is likewise hardly novel to suggest that when officers have the power to compel pedestrians to identify themselves upon pain of arrest, pedestrians engaged in speech activities, especially unpopular ones, will have their speech chilled.

CONCLUSION

The issue in this case goes to the nature of freedom and the individual's relationship to the state. Protection of individual privacy is imperative in order to remain a free society. Compelled identification during *Terry* stops undermines that imperative.

The proper solution is to adopt a bright line rule which provides clear guidance to the police while at the same time protecting individual liberties without overburdening the

courts, namely, that suspects may be questioned, but their answers may not be compelled. Accordingly, the judgment of the Supreme Court of the State of Nevada should be reversed.

Respectfully submitted,

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DEC 15 2003

In The

Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

v.

SIXTH JUDICIAL DISTRICT COURT
OF NEVADA, HUMBOLDT COUNTY, et al.,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Nevada

BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported civil liberties organization working to protect rights in the information society. EFF actively encourages and challenges government and the courts to support privacy and safeguard individual autonomy.

SUMMARY OF ARGUMENT

Independent of and in addition to petitioner David Hiibel's claim that his conviction violates his Fourth Amendment rights against illegal searches and seizures, the Nevada statutory scheme categorically violates his Fifth Amendment privilege against self-incrimination by effectively giving law enforcement agents the power to require individuals to speak their names upon pain of criminal prosecution.

Only in the most limited instances can a government official compel a person to utter any factual assertion. A witness in a court or grand jury proceeding can be punished as a contemnor for refusing to speak or to answer questions, but only because in such contexts a judicial officer can ensure that the words demanded are not both testimonial and self-incriminating so as to implicate the Fifth Amendment. Outside of formal legal proceedings or special settings like vehicle stops, however, a government

[1] Letters of consent from both parties have been filed with the Clerk of Court. No counsel for either party has authored this brief, in whole or in part.

official cannot force an individual to utter testimonial words that pose any risk of self-incrimination.

Because uttering one's name to identify oneself is inherently testimonial, because such utterance risks self-incrimination without any judicial officer to determine otherwise, and because Nevada's questioning of Hiibel did not involve a vehicle stop or other special regulatory context, the statutory scheme under which Hiibel was convicted violates the Fifth Amendment.

ARGUMENT

The Fifth Amendment's guarantee that "[n]o person . . . shall be compelled in a criminal case to be a witness against himself" protects persons from being compelled to answer questions from government officials in all but a few specific and limited situations. In a court or grand jury proceeding, an individual is always offered judicial process to protect his Fifth Amendment rights. In an encounter with a government official outside formal legal process, the individual cannot be compelled by any threat of or actual legal sanction to utter testimonial, self-incriminating words.

The Nevada statutory scheme empowers police officers to determine when individuals must speak their identity.[2] When circumstances "reasonably indicate" that

[2] Nevada Revised Statute (NRS) 171.123 provides:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably

(Continued on following page)

an individual is engaged in criminal activity, police officers can force that individual to self-identify. Nevada's delegation of the power to compel speech conflicts with this Court's view of the Fifth Amendment, in which the power to compel speech has always been reserved to the judiciary. In forcing individuals to state their name upon pain of arrest or criminal prosecution, the Nevada statutory scheme impermissibly compels testimonial speech in a context where there is a substantial risk that it will be self-incriminating.

I. Hiibel's case falls outside the context of a formal legal proceeding where a judicial officer is available to protect an individual's Fifth Amendment rights.

One of the few instances in which an individual can be sanctioned for refusing to speak is in a formal proceeding

> indicate that the person has committed, is committing or is about to commit a crime.
>
> [. . .]
>
> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

NRS 199.280 provides:

> A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished:
>
> [. . .]
>
> 2. Where no dangerous weapon is used in the course of such resistance, obstruction or delay, for a misdemeanor.

such as a grand jury or court proceeding. Refusal to speak under these circumstances can lead to the punishment of contempt of court. *United States v. Wilson*, 421 U.S. 309, 317 n.9 (1975). As the Court held in *Chavez v. Martinez*, "[i]t is well established that the government may compel witnesses to testify at trial or before a grand jury, on pain of contempt, so long as the witness is not the target of the criminal case in which he testifies." 123 S.Ct. 1994, 2001 (2003). But this sanction for refusing to speak is necessarily preceded by extensive legal process to ensure that the testimony being compelled does not require the individual to self-incriminate. Hiibel and others similarly situated have no such protection.

The Court has also held that "disclosure of private information may be compelled if immunity removes the risk of incrimination." *Fisher v. United States*, 425 U.S. 391, 400 (1976); *see also Ullmann v. United States*, 350 U.S. 422, 437 (1956). Testimony may also be compelled if the judge determines that even non-immunized testimony contains no risk of implicating the witness in any criminal activity.[3]

Moreover, even where a person enjoys access to judicial review before suffering any sanction for refusal to speak, courts are reluctant to impose criminal sanctions

[3] As Chief Justice Marshall wrote, "[w]hen a question is propounded, it belongs to the court to consider and to decide whether any direct answer to it can implicate the witness. If this be decided in the negative, then he may answer it without violating the privilege which is secured to him by law. If a direct answer to it may criminate himself, then he must be the sole judge what his answer would be." *United States v. Burr*, 25 F.Cas. 38, 40 (C.C.D. Va. 1807) (No. 14,692e). *See also Mason v. United States*, 244 U.S. 362, 364-365 (1917).

unless absolutely necessary. In *Shillitani v. United States*, where a witness refused to answer questions even after he had been given immunity, the Court held that the judge must "first consider the feasibility of coercing testimony through the imposition of civil contempt. The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate." 384 U.S. 364, 372 n.9 (1964); *see also Young v. United States ex rel. Vuitton*, 481 U.S. 787, 801 (1987).

Under this Court's precedents, then, individuals are entitled to judicial determination of whether their speech would amount to testimonial self-incrimination before it can be compelled. The statutory scheme under which Hiibel was convicted is entirely unlike the witness testimony exception because it lacks the essential element that safeguards Fifth Amendment rights in that context: judicial review. The Nevada scheme allows police officers, not judges, to decide when speech may be compelled. NRS 171.123(1) empowers officers to detain individuals under "circumstances which reasonably indicate" that individual is engaged in criminal wrongdoing, while NRS 171.123(3) permits the officer to require the individual identify himself. The judiciary is completely bypassed.[4]

[4] Later formal legal process would not solve the Fifth Amendment problem here. If, in a criminal trial under NRS 171.123, the state tries to persuade the judge that the defendant's name would not have been incriminatory in the context of the street investigation and the crime being investigated, the defendant's refusal to answer at the time of the question would undeniably remain the basis for the arrest and prosecution.

II. Hiibel was criminally punished for refusing to utter inherently testimonial words that posed a serious risk of self-incrimination, under threat of a criminal sanction that prevents any finding that the utterance was voluntary.

That Hiibel was not participating in a formal proceeding at the time of his refusal to speak does not deprive him of Fifth Amendment protection.[5] Moreover, Hiibel's case lies outside any of the categories of questioning outside formal legal process where law enforcement agents can impose sanctions for refusal to comply with their demands to speak. One such category is speech that clearly is not testimonial. The second is where legal indicia of waiver ensure that the statement is voluntary and therefore not compelled. Because the Nevada statutory scheme compels speech by threat of criminal sanction and the speech that is compelled is testimonial, if falls into neither of these categories and therefore violates the Fifth Amendment.

A. Stating one's name is testimonial.

The Fifth Amendment's protections against compelled self-incrimination only apply to "testimonial" communications. *United States v. Hubbell*, 530 U.S. 27, 34 (2000). A testimonial communication is one that requires an individual to "relate a factual assertion." *Pennsylvania v. Muniz*, 496 U.S. 582, 589 (1990) (citing *Doe v. United States*, 487 U.S. 201, 210 (1988)).

[5] Just as *Miranda* extended the Fifth Amendment outside the courthouse, *Berkemer v. McCarty* made clear that the Amendment's protection extends to police stops based on less than probable cause. 468 U.S. 420, 439 (1984).

The Fifth Amendment is not implicated when a person is forced to utter words that have no testimonial value. *Schmerber v. California*, 384 U.S. 757, 761 (1966). Compulsion to produce "real or physical evidence" does not violate the Constitution. *Schmerber*, 384 U.S. at 764; *Holt v. United States*, 218 U.S. 245 (1910). As the Court explained in *Muniz*, requiring an individual to take a blood test raises no Fifth Amendment concerns because it does "not entail any testimonial act on the part of the suspect." 496 U.S. at 593. "In contrast, had the police instead asked the suspect directly whether his blood contained a high concentration of alcohol, his affirmative response would have been testimonial." *Id.*[6]

The Nevada statutory scheme is unlike the forced utterance cases above because stating one's name is testimonial.[7] An individual's statement of identity is inherently testimonial because it requires him or her to "relate a factual assertion." *Muniz*, 496 U.S. at 589 (citing *Doe v. United States*, 487 U.S. 201, 210 (1988)).

Further, in many circumstances, stating one's name will also be self-incriminating because one's name may

[6] Another way to comprehend the line between testimonial and non-testimonial evidence is to ask whether the individual could lie in response to the question posed. George Fisher, *Evidence* 800 (2002). To say one's name is to "relate a factual assertion" about which one could lie.

[7] *United States v. Wade*, 388 U.S. 218 (1967), does not support the proposition that stating one's name is not testimonial. When Wade was required to say words that had been uttered by the suspected robber, it was the sound of his voice, a physical characteristic, which was at issue. *Id.* at 222-223. Wade was "required to use his voice as an identifying physical characteristic, not to speak his guilt." *Id.*

provide a link to other facts about that individual that can be used to levy a higher penalty. After all, were it not for the capacity of identification requirements to link individuals to other acts, they would be of little interest to the police. Importantly, the statute only applies when it is substantially likely that stating one's name will be incriminating: when circumstances "reasonably indicate that the person has committed, is committing or is about to commit a crime." NRS 171.123(1).

Because the Nevada statutory scheme compels Hiibel to produce testimonial speech, it is not supported by cases excluding the mere production of non-testimonial, physical evidence from the protection of the Fifth Amendment.

B. Answering a police officer's questions in circumstances where refusal to answer constitutes grounds for arrest or prolonged detention is not voluntary.

Even outside formal legal process, a testimonial and self-incriminating answer to a law enforcement agent's question will not raise Fifth Amendment concerns if it is purely voluntary. *Minnesota v. Murphy*, 465 U.S. 420, 429 (1984) (voluntary response to non-custodial questioning; *North Carolina v. Butler*, 441 U.S. 369, 373 (1979) (voluntary response to custodial questioning where *Miranda* warnings properly received); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.").

This case does not involve any voluntary statement. A statute that criminalizes refusing to speak one's name

unquestionably compels speech. Thus, the Nevada statutory scheme bears no resemblance to circumstances under which the Court has in the past found speech voluntary.

As mentioned earlier, uttering of one's name is inherently testimonial and may be self-incriminating. In a street encounter, where no judicial official can determine whether the statement is incriminating, the presumption must be that it is.[8] Refusal to speak under these circumstances is like the "insolubly ambiguous" silence at issue in *Doyle v. Ohio*, which the Court held could not be used for impeachment purposes at trial. 426 U.S. 610, 617 (1976).[9] Even though Hiibel may not have been in custody, the presence of a public criminal law punishing the refusal to identify oneself is a species of legislative compulsion that surely requires proof of waiver.[10]

Nor is the Nevada statutory scheme analogous to the identification statute upheld in *California v. Byers*, 402 U.S. 424 (1971), which required those involved in traffic

---

[8] The assumption that silence has Fifth Amendment value is especially valid given the widespread knowledge of the right to remain silent, which the Court recognized as pervasive in *Brogan v. United States*, 522 U.S. 398, 405 (1998).

[9] *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980), where the Court held that pre-arrest silence may be admitted to impeach a defendant's trial testimony, is distinguishable; the defendant did not face police questioning at the time of the silence, and his silence was not an element of any criminal offense.

[10] The state could hardly reply that defendants like Hiibel are unaware of the criminal punishment under the statute and therefore do not feel compelled, because then the state would essentially be admitting that the statute violates due process by not giving the public fair notice of the action criminalized. *See Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

accidents to stop and identify themselves. *Id.* at 425. The plurality opinion held that the statute survived a Fifth Amendment challenge because it possessed two decisive characteristics: the statute was "neutral on [its] face and directed at the public at large," *id.* at 429 (quoting *Albertson v. SACB*, 382 U.S. 70, 79 (1965)) and it was "noncriminal and regulatory," *id.* (quoting *Albertson*, 382 U.S. at 70)). The Court took note that the statute "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising in automobile accidents." *Id.* at 430. These factors fatally undermined Byers's ability to demonstrate "substantial hazards of self-incrimination." *Id.* at 429 (quoting *United States v. Sullivan*, 274 U.S. 259 (1927)).[11]

In stark contrast, the Nevada statute *only applies* when a law enforcement agent "reasonably believes" that a person "has committed, is committing or is about to commit a crime." NRS 171.123(1). It thus lacks both of the critical characteristics of the statute in *Byers*. It is not "directed at the public at large" because it vests discretion in law enforcement agents to compel identification from a narrow subset of the population, those "reasonably believe[d]" to be involved in criminal activity. And it is obviously not "non-criminal." The Nevada statutory scheme more closely resembles that struck down in *Albertson v. Subversive Activities Control Board*, which required

[11] The Court has applied the regulatory purpose exception beyond the context of vehicle stops. *See Baltimore City Dep't of Social Services v. Bouknight*, 493 U.S. 549, 556 (1990) (rejecting Fifth Amendment challenge to juvenile court order requiring a mother to produce her child, on grounds that "production is required as part of a noncriminal regulatory regime.").

identifying information from those deemed criminally suspect. 382 U.S. at 79. ("Petitioners' claims are not asserted in an essentially noncriminal and regulatory area of inquiry").

Only under the most limited circumstances may government officials compel individuals to speak. Individuals testifying in court or grand jury proceedings may be required to speak, but only after thorough judicial review to determine that their speech does not constitute testimonial self-incrimination. Out of court, individuals can be compelled to speak when their speech has no testimonial value. Because the Nevada statutory scheme compels testimonial self-incrimination by requiring individuals to choose between speaking their names or facing criminal sanctions, it is unconstitutional.[12]

[12] That is not to say that an individual cannot suffer negative consequences for refusing to speak. An individual's refusal to clear his name, for instance, may validly lead law enforcement officers to stop him for further investigation. *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring). This circumstance is, however, quite different from that in *Hiibel*, where the silence *itself* is criminalized.

CONCLUSION

Amicus submits that the Nevada statutory scheme violates the Fifth Amendment.

Respectfully submitted,

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[13] Amicus is grateful to Stanford Law Student Catherine Newby Crump for her invaluable contributions to this brief.

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In The Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Nevada

BRIEF OF *AMICI CURIAE* PRIVACYACTIVISM, CYBER PRIVACY PROJECT, AND FREETOTRAVEL.ORG IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST BY *AMICI CURIAE*[1]

Amicus curiae PrivacyActivism is a non-profit organization dedicated to informing and empowering individuals about their privacy rights on the Internet. Through a mixture of education (using graphics such as posters and video games), activism, and the law, we strive to make complex issues of privacy law, policy, and technology accessible to all. Because we feel that the ruling in this case has not adequately taken into account the severity of privacy and anonymity issues, we believe this ruling should be reversed.

Amicus curiae Cyber Privacy Project (CPP) is a non-partisan organization focusing on governmental intrusions against Fourth and Fifth Amendment rights of personal privacy, particularly in governmental databanks and national identification schemes for work and travel, and on medical confidentiality and patient consent. CPP director Richard Sobel is a scholar of identity issues, and a senior research associate at the Program in Psychiatry and the Law at Harvard Medical School.

Amicus curiae FreeToTravel.org is an association with the mission of protecting the constitutional right to travel and more generally preserving freedom of movement. *Amicus* educates policymakers, the press, and the general public about travel issues, publishes archives of right to

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae*, or their counsel, made a monetary contribution to the preparation or submission of this brief.

travel jurisprudence, and supports litigation to protect free travel interests.

Amici believe that pedestrian identification requirements seriously inhibit free movement, free speech and association, the ability to engage in these pursuits anonymously, and the right to remain free from unreasonable searches. Consequently, *Amici* have a vital interest in the outcome of this case and encourage this Court to draw a bright line rule stating that compelled identification is unconstitutional.

SUMMARY OF THE ARGUMENT

In Nevada today, police officers may choose whether or not to demand identification from pedestrians during lawful *Terry* stops. If the pedestrian refuses to identify himself, he risks arrest. The result is that innocent persons, who would otherwise be free to leave after the brief *Terry* detention, must now identify themselves as a condition of ending that encounter. This situation has a profound impact that reaches beyond the guarantees of the Fourth Amendment and falls squarely into the realm of First Amendment abuse. A great deal of protected First Amendment activity can appear suspicious within the definition provided by *Terry* and its progeny. This Court has already decided in cases based on such fundamentally First Amendment-protected activities that requiring participants to reveal their identities is too chilling to permit.

ARGUMENT

I. Under Nevada's Ruling, a *Terry* Stop Becomes an Identification Checkpoint, Invasively Requiring Innocent Pedestrians to Divulge Their Identities or Face Arrest.

Prior to the Nevada Supreme Court's ruling, innocent pedestrians were secure in the knowledge that if they were stopped, pursuant to a lawful *Terry* investigation, they would be free to resume their activities after a brief detention. Under the Nevada rule, however, such persons must now take an affirmative action to regain their freedom – they must identify themselves or face arrest. A *Terry* stop under the Nevada rule thus becomes an identification checkpoint in which innocent persons are forced to justify their very existence to officers, or be arrested.

Contrary to Judge Young's assertion, "[r]equiring identification" is not "far less intrusive than conducting a pat down search of one's physical person." *Hiibel v. Sixth Judicial Dist. Court*, 59 P.3d 1201, 1206 (Nev. 2002). A *Terry* frisk can be performed on anyone, is over quickly, and leaves no lasting traces. An officer encountering the same person the next day cannot frisk that person again based on the previous night's *Terry* stop. An identification demand, however, cannot be satisfied by someone without a credential. And if a credential is provided, nothing prevents an officer from remembering the identity, writing it down, or radioing it in to headquarters, actions considered good police practice. Nothing prevents the officer from looking the suspect up in a database after the *Terry* encounter has ended, or from recording the identities of persons routinely *Terry* stopped, perhaps to trade notes with other officers. Moreover, credentials seldom contain just a name. Instead, every bit of information on the

credential, or tied to it in a database, now becomes accessible to the officer and his colleagues. Home address, date of birth, Social Security number, fingerprints, arrest records, driving history, employment, banking, publications, Internet commentary, DNA samples, and health history, are but a few of the details about a person which could potentially be accessed.

Terry frisks must be limited to weapons detection. Nevada suggests that "knowing the identity of a suspect allows officers to more accurately evaluate and predict potential dangers that may arise during an investigative stop." *Hiibel*, 59 P.3d at 1205. Nevada's premise is specious. To be of any practical value, officers will not stop at merely obtaining identification, but will verify it in computerized databases and retrieve additional data, such as a residence address. Officers will then be able to decide, on a whim, whether a suspect "belongs" in the expensive neighborhood in which he is *Terry* stopped, especially if his listed home address is a housing project.

When identification may not be compelled, innocent pedestrians whose faults lie solely in suspicious skin color, hair styles, or clothing know that if they are stopped, they may be twenty minutes late to their intended engagement, and have to suffer the indignity of a pat down. Having committed no crime, however, such pedestrians should be secure in the knowledge that, while *Terry* stops are annoying and temporarily rob them of their right to walk the streets unmolested, they will not ultimately be arrested for merely appearing suspicious. *Terry* stops are especially frequent for minorities in high crime areas. As a result,

certain innocent persons, especially minorities, are undoubtedly accustomed to being routinely stopped by police.[2]

Under Nevada's version of *Terry*, however, those same, ultimately innocent pedestrians are no longer secure in the knowledge that they will merely be late to their destinations. Instead, they must take the active step of identifying themselves, upon pain of arrest. Their release from a *Terry* stop is predicated on relinquishing anonymity, presumably to the officer's satisfaction that they are not wanted or otherwise detainable further.

In *Coffin v. United States*, Justice White traced presumption of innocence to an anecdote by Emperor Julian demonstrating its use. 156 U.S. 432 (1895). At the end of a trial, it was plain that the accuser, Delphidius, had presented insufficient evidence upon which to convict the defendant, who had maintained his innocence and presented no evidence of his own. Delphidius exclaimed, "'Oh, illustrious Caesar! If it is sufficient to deny, what hereafter will become of the guilty?' to which Julian replied, 'If it suffices to accuse, what will become of the innocent?'" *Id.*, at 455. Under the Nevada rule, a person must prove his identity, and implicitly with it, his innocence. This is clearly at odds with American notions of

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[2] Edward Lawson typifies such a person. Lawson was stopped 15 times in a period of less than two years for such reasons as "walking on an otherwise vacant street because it was late at night, the area was isolated, and the area was located close to a high crime area," and "walking at a late hour in a business area where some businesses were still open ... because burglaries had been committed by unknown persons in the general area." *See Kolender v. Lawson*, 461 U.S. 352, n.2 (1983).

innocence and guilt. The assumptions behind a *Terry* identification demand impermissibly reverse the presumption of innocence and give police officers too much discretion.

II. Free Movement and Anonymity Are Essential Elements to the Exercise of Many First Amendment Activities.

A. Free Movement.

Freedom of movement is a necessary condition for the exercise of many First Amendment rights. Routine identity checks desensitize us to their authoritarian nature, eventually eliminating the sense that it is wrong to have to identify ourselves merely to pass from here to there. An identification demand, of any kind, affects an individual's freedom of movement.

This Court has repeatedly found the right to move about freely on public streets as one of the core liberties of citizenship. It rests on personal security against unwarranted searches and seizures and the right to be left alone that this implies. As Chief Justice Warren observed in his majority opinion in *Terry v. Ohio*, "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." 392 U.S. 1, 9 (1968).

In *Chicago v. Morales*, this Court affirmed that the "right to remove from one place to another according to inclination [is] an attribute of personal liberty protected by the Constitution." 527 U.S. 41, 53-54 (1999). An "individual's decision to remain in a public place of his choice is as

much a part of his liberty as the freedom of movement inside frontiers that is a part of our heritage, or the right to move to whatsoever place one's own inclination may direct." *Id.*

Few rights guaranteed under the First Amendment may be enjoyed without moving about. In order to associate with others in political activities or pursue religious beliefs, one must be able to go to the place where one's associates meet. In order to assemble and participate in a demonstration against a government policy, boycott a business, or rally on behalf of a political candidate, freedom of movement is a prerequisite. Of course, one may not *speak* to such a rally without traveling.

B. Anonymity.

Use of anonymous rhetoric has a rich history in America dating to the founding of this country. The Federalist Papers are perhaps the finest example of the importance of anonymity.[3] Authored by James Madison, Alexander Hamilton, and John Jay, under the moniker "Publius," the work may never have been published or distributed had the authors been forced to reveal their true identities. Similarly, the pre-Revolutionary War "Letters of Junius" pseudononymously espoused a wealth of constitutional rhetoric during the years 1767-1772,

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[3] THE FEDERALIST PAPERS (Clinton Rossiter, ed., 1961).

including sentiment that ultimately influenced the content of the Bill of Rights.[4]

For centuries, anonymity has also been employed positively for more mundane purposes. In his autobiography, Benjamin Franklin recounted how he employed anonymity not to found a republic but to be printed in his brother's newspaper.[5]

A form of anonymity – substituting a number for a name – is employed by many law journals when assessing the writing skills of prospective journal members. Indeed, this technique of "blinding" academic submissions is similarly employed by law schools around the country during examinations. Moreover, authors in general have a history of adopting pseudonyms,[6] for varying reasons.

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[4] For example, in 1772, Junius wrote, "The liberty of the press is the palladium of all the civil, political and religious rights of an Englishman. . . . " JOSEPH STORY, *Document 33 in* COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).

[5] FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN ("[B]eing still a Boy, & suspecting that my Brother would object to printing any Thing of mine in his Paper if he knew it to be mine, I contriv'd to disguise my Hand, & writing an anonymous Paper I put it in at Night under the Door of the Printing House. It was found in the Morning & communicated to his Writing Friends when they call'd in as Usual. They read it, commented on it in my Hearing, and I had the exquisite Pleasure, of finding it met with their Approbation, and that in their different Guesses at the Author none were named but Men of some Character among us for Learning & Ingenuity.")

[6] *E.g.*, Mark Twain (Samuel Langhorne Clemens), O. Henry (William Sydney Porter), Voltaire (Francois Marie Arouet), George Eliot (Mary Ann Evans), Charles Dickens (sometimes writing as "Boz"), and Dr. Seuss (Theodore Geisel).

This Court has recognized the benefits inherent in anonymity spanning this country's history – particularly among dissidents. Throughout *McIntyre v. Ohio Elections Comm'n*, the Court eloquently referenced the "important role in the progress of mankind" that anonymous literature in all forms has played:

> Anonymity . . . provides a way for a writer who may be personally unpopular to ensure that readers will not prejudice her message simply because they do not like its proponent. [There is] a respected tradition of anonymity in the advocacy of political causes. This tradition is perhaps best exemplified by the secret ballot, the hard-won right to vote one's conscience without fear of retaliation.

514 U.S. 334, 341-43 (1995) (quoting *Talley v. California*, 362 U.S. 60, 62 (1960) (internal quotations and footnotes omitted). *See also Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Brown v. Socialist Workers' 74 Campaign Comm.*, 459 U.S. 87, 91 (1982) (holding that the "Constitution protects against the compelled disclosure of political associations"); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 623-28 (1976) (Brennan, J., concurring in part) (asserting disclosure requirements put an impermissible burden on political expression); *Shelton v. Tucker*, 364 U.S. 479, 485-87 (1960) (holding invalid a statute compelling teachers to disclose associational ties because it deprived them of free association rights); *Talley v. California*, 362 U.S. 60, 64-65 (1960) (voiding an ordinance compelling the public identification of group members); *Bates v. City of Little Rock*, 361 U.S. 516, 522-24 (1960) (holding, on free assembly grounds, that the NAACP did not have to disclose its membership lists); *Joint Anti-Fascist Refugee Comm. v.*

McGrath, 341 U.S. 123, 145 (1951) (Black, J., concurring) (expressing the fear that dominant groups might suppress unorthodox minorities if allowed to compel disclosure of associational ties).

Anonymity is also an important guarantor of other First Amendment activity. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute . . . restraint on freedom of association. . . . " *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). "Anonymity is a shield from the tyranny of the majority. It . . . protect[s] unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *McIntyre*, 514 U.S. at 357. It also protects innocent individuals from unwarranted police intrusions.

C. Compelled Identification During *Terry* Could Circumvent Well-Established First Amendment Freedoms.

The effect of compelled identification on First Amendment activity can be seen by removing rights to free movement and anonymity from the exercise of those activities, and evaluating the end results. Mandatory identification schemes "implicate consideration of the constitutional right to freedom of movement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). As identification is anathema to anonymity, such schemes also implicate that right.

In *NAACP v. Alabama ex rel. Patterson*, a unanimous Court noted with concern the "threat of physical coercion, and other manifestations of public hostility" that NAACP members would face if their identities were disclosed. *Id.*

at 462. The Court recognized that advocacy is enhanced by association, and that the ability to speak and associate freely relies on anonymity:

> "We hold that the immunity from state scrutiny . . . is here so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing to come within the protection of the Fourteenth Amendment."

357 U.S. 449, 465 (1958).

Compelled identification's harm may be especially pronounced in politically active places, such as at protests or at minor political party meetings. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association. . . . " *Id.* at 462. Would protestors bother painting picket signs and traveling to a demonstration if officers had the power to compel their identities upon mere suspicion of wrongdoing? If the protest's theme were shared by a large portion of a community, they might. If the message were unpopular, however, compelled identification might be more likely – due to officer concern that contrarians intend mischief – and ultimately more stifling to the cause. Large numbers of NAACP members may thus have been intimidated into passivity, derailing the civil rights movement, had police been able to demand identification of people participating in NAACP events. Such an intrusion into the free movement of its members might have driven the organization underground, robbing it of the high visibility that was an element crucial to its success.

The *NAACP* Court also noted that compelled identification can "induce members to withdraw from [an] Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure." *Id.* at 463. To a diligent officer, attendees of a nighttime Alcoholics Anonymous meeting or an inner-city adult literacy class may appear suspicious as they travel to or arrive at their destination. If program participants could be compelled to identify themselves, they may well refrain from attending.

The ability to physically attend meetings and protests, rather than merely read about them, or watch them on television, is generally taken for granted. If identification checkpoints were encountered en route, however, the importance of the "right to wander freely and anonymously" in enabling First Amendment activity would become abundantly more apparent. *Hiibel* at 1204.

D. High Standards Exist for Overcoming Anonymity in Other Legal Areas.

Judge Young argues that "we reveal our names in a variety of situations every day without much consideration," implying that the decision whether or not to reveal one's identity is of effectively "nominal" consequence. *Hiibel v. Sixth Judicial Dist. Court*, 59 P.3d 1201, 1206 (Nev. 2002). Such an assertion is plainly contrary to the amount of litigation on the topic, especially outside of the context of *Terry* and in the recent development of jurisprudence governing Internet defamation. Higher equivalent standards than reasonable suspicion outside of the criminal justice area suggest how inadequate reasonable suspicion alone is for permitting an identity search.

Dendrite International, Inc. v. Doe, No. 3 is recognized by many as the seminal case defining the proper standards for when an Internet Service Provider (ISP) must honor a subpoena for the identity of an anonymous or pseudononymous user. 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001). The *Dendrite* defendant used the name, "xxplrr," to post nine comments to a Yahoo! bulletin board about supposed accounting practice changes at Dendrite, as well as an attempt by the CEO to sell the company. The court noted the importance of "striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interest and reputation through the assertion of recognizable claims based on the actionable conduct. . . ." *Id.* at 760. Building upon the framework set out in *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999), the *Dendrite* court held that an ISP should only be required to provide subscriber identity information: (1) when the court is satisfied, by evidence or pleadings; (2) that the subpoena requester has a legitimate, good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed; and (3) the subpoenaed identity information is centrally needed to advance that claim. It is difficult to find an exact fit between this civil rule and criminal procedure requirements. Nonetheless, *Dendrite* plainly demonstrates that people's interests in their identity should not be overcome upon mere allegations of wrong-doing by an allegedly aggrieved party. The weak requirements of reasonable suspicion are analogous to the mere allegations rejected in *Dendrite*, and thus reasonable suspicion provides an insufficient base for an officer to gain identity information from a pedestrian during a *Terry* stop.

Whether or not identity can be compelled is also central to evaluating the boundaries of a reporter's ability to keep a source confidential. As argued in *Branzburg v. Hayes*, reporters' relationships with informants rely primarily on trust that those informants' identities will not be revealed. 408 U.S. 665, 671 n.5 (1972). Journalists thus routinely attempt to quash subpoena motions for their sources' identity, to avoid revealing that information in both civil and criminal cases. The policy interest often advanced by journalists is that the ability of news reporters to collect, assemble, and distribute news to the public is central to the free flow of ideas, and compelling identification would chill those efforts. *See, e.g., Pinkard v. Johnson*, 118 F.R.D. 517, 520 (M.D. Ala. 1987). The emerging standards for compelling information from reporters, whether in civil, or criminal proceedings, do not treat sources' identities as "nominal" bits of information. Rather, courts weigh "the paramount interest served by the unrestricted flow of information protected by the First Amendment [against] the subordinate interest served by the liberal discovery provisions. . . . " *Loadholtz v. Fields*, 389 F. Supp. 1299, 1300 (M.D. Fla. 1975). Civilly, the appropriate test requires the seeking party to show: (1) the identity is relevant; (2) there are no other means for obtaining the identity, or all other means have been exhausted; and (3) there is a compelling reason for the identity. *Id.* Such a standard is significantly higher than the requirements of reasonable suspicion.

III. A Requirement that a Detainee "Shall Identify Himself" is Too Vague to Enforce.

A. Verbal Identification is Vague and Largely Useless.

The core rationale given for the identity exception is that it would help protect officers by alerting them that their detainee is potentially dangerous. *See Hiibel*, 59 P.3d at 1205. But, if Section 171.123(3) is truly limited to verbal identification, little information and little safety is gained. In a small town, it is likely that the name of someone not personally known to the officer will not help that officer assess the danger. In cities, many people may have the same name. In a highly mobile society, a stopped "David Nelson," may be any one of hundreds or thousands of other individuals with the same name.[7] Verbal identities offer the officer little safety, but a large degree of discretionary power.

One could interpret Nevada Revised Statute 171.123(3)'s "shall identify himself" language to compel only a verbal identification, and not the production of credentials. However, many Americans today equate "identification" with a credential such as a driver's license, ID card, or passport, rather than just a verbal act. Even

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[7] According to Pdom.com, an Internet business which researches public records databases and registers personal domains, there are 5,200 persons named David Nelson in the United States. Professor David Nelson of Northwestern University and others, including the son of TV stars Ozzie and Harriet, have been frequently stopped at airports because a David Nelson appears on a government no-fly list. *See* Rex Huppke, *Name Can Set Off Bells with Airport Security: David Nelsons Need Extra Time, Patience, at U.S. Checkpoints,* CHI TRIB, June 29, 2003, at 1.

Judge Young switches back and forth from using the word as a verb, when discussing the statutory language, to a noun, when discussing identification in practice. *Hiibel*, 59 P.3d at 1205, 1206.

If the Court decides that only a verbal response is required, then the statute's wording as it stands would be misleading. Officers will continue to demand that one "identify himself," and the public will almost uniformly feel compelled to offer a credential, even when there is no legal backing for such a demand. The interrogating officer will certainly not offer a clarifying interpretation to the victim of this deception.

Assuming, *arguendo*, that the statute requires only verbal identification, it is nonetheless vague, because the concept of identity is itself vague. What constitutes an acceptable and sufficient response?

- "Larry Hiibel."
- "I am Mrs. John Smith." What if the person is a married woman? Can she give her husband's name, maiden name, or must she give the name she most often uses?
- "Starchild Moonbeam." What if the person has long forsaken his given name, changing under common law but not by formal court decree?
- "My name is Jane." "Dr. Jones, at your service." May one give only a first name, as is customary in situations such as "meeting a new acquaintance"? *Hiibel*, 59 P.3d at 28. Or, may only a last name be given?

- "I'm Magic Johnson." If a person is better known by a nickname than by the name given by his parents is this acceptable?
- "I live here and am walking my dog." Can people describe their lawful presence, rather than providing formal names?
- "George Bush." "I am J. Piermont Morgan." Must a person supply a middle initial or middle name if his first and last name are common? May initials be used in lieu of other parts of a name?
- "My only name is Arvind." There are people who have only one name, because that is the custom of their culture.
- "I am Abdullah Ahmad Badawi." Must people signify which parts of the name they give are honorifics, which are the family name, and which the personal name?

Must any other verbal identifying information be given, such as a date of birth, residence address, telephone number, Social Security number, citizenship, nationality, or employer? If the officer is not satisfied with the initial response and continues asking questions about identity, is the suspect compelled to answer all of them? At what point can he return to remaining silent without risking a legitimate arrest?

If dissatisfied with the verbal identification, or lack thereof, provided during a *Terry* stop, will an officer then have the discretion to commence an identity frisk – for example, by searching the suspect's wallet, purse, or briefcase for identifying information – though there exists no constitutional basis for such searches?

The short statute does not answer any of these questions. It would take dozens of precedent-setting court decisions in different factual circumstances to even pretend to have answers for some of them. Yet innocent citizens being detained must answer them, without guidance, and upon pain of arrest if they answer incorrectly.

B. Requiring a Credential Document is Also Vague, Requires Due Process on Credential Issuance, and Exposes Large Amounts of Irrelevant and Damaging Information.

Assume, *arguendo*, that the plain meaning of "shall identify himself" instead requires that the detainee produce a credential. Such a statute is still highly vague, because the concept of credentials is almost as vague as that of identity. A line of questions arises regarding what credentials are acceptable that closely parallels the previous list of what verbal response would be acceptable.

To mention just a few:

- Is presentation of photo identification sufficient or even necessary?
- Must the person present the "best" identification available at the time, such as a passport one is carrying, over shopping cards or credit cards one is also carrying?

A clarifying construction of "credible and reliable" identification was declared unconstitutionally vague in *Kolender v. Lawson*, thus only a more precise formulation has any hope of constitutionality. 461 U.S. 352, 354 (1983).

Nevada shares borders with California, Oregon, Idaho, Utah, and Arizona. People may constitutionally

enter Nevada on foot or as passengers from any of those states. Most non-Nevadans are not required to obtain or produce any credentials by their home jurisdiction. Even if Nevada were to accept "comparable credentials" from other jurisdictions, vagueness concerns loom. If non-residents risk arrest the moment they set foot in Nevada without credentials acceptable to Nevada, the right of free ingress and regress would be undermined.

A law that makes people subject to arrest unless they follow certain rules, without providing any way for them to follow those rules, would clearly violate the Fourth Amendment protection against unreasonable seizures and raise serious due process concerns.

To obtain a Nevada identification credential, a person must provide a great deal of private information, along with underlying documentation which he may or may not have.[8] *See* NRS 483.850; 483.860. The Nevada credentialing process also requires a physical or mailing address. *Id.* Many retirees are mobile, and have no residence address. Citizens are not otherwise required to have a mailing address, and many do not; yet Nevada law does not accommodate those without addresses. If credentials are required, people must be given ways to obtain those credentials, and due process must attach to their issuance.

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[8] For example, 7,000 citizens of the Tohono O'odham Nation, a large Indian reservation in Arizona, have no birth records because the tribe's customs did not include writing down births. *See* Jeffry Scott, *Nation Divided: Tohono O'odham Campaign for Citizenship*, ARIZONA DAILY STAR, May 30, 2001.

If NRS 171.123(3) were interpreted to require a credential, either the definition of acceptable credentials would be unconstitutionally vague, or many other parts of Nevada law would also have to be reinterpreted to avoid potential due process and equal protection concerns. Neither alternative is acceptable.

C. No Reasonable Interpretation Can Be Made.

Section 171.123(3) demands that a detained pedestrian "shall identify himself, but may not be compelled to answer any other inquiry of any police officer." The statute, however, does not explain how a pedestrian shall effect this identification, nor does it enumerate identification methods that are unacceptable, nor does it provide a procedure to follow should an officer be dissatisfied with an identification attempt. In *Kolender v. Lawson*, the Court held as impermissibly vague a statute requiring "credible and reliable" identification upon being stopped for one of several circumstances set out by California statute. 461 U.S. 352, 354 (1983). At the outset, Nevada's statute is more vague than that struck down in *Kolender*, because it provides even less guidance to officers and pedestrians.

The Nevada scheme creates a broad range of questions, and the statute "requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application," in clear violation of the vagueness doctrine. *United States v. Lanier*, 520 U.S. 259, 266 (1997) (internal quotation marks omitted).

"That citizens can walk the streets, without explanation or formal papers, is surely among the cherished liberties that distinguish this nation from so many others." *Gomez v. Turner*, 672 F.2d 134, 143-44 n.18 (D.C. Cir. 1982). This Court should remind the Nevada Supreme Court of this cherished liberty by embracing it fully, and forbidding compelled identification schemes.

IV. Compelled Identification Schemes are Historically Harmful.

The ramifications of identification schemes were eloquently described in *State v. Kerwick*, 512 So. 2d 347, 349 (4th Fla. Dist. Ct. App. 1987):

> "[T]he evidence in this cause has evoked images of other days, under other flags, when no man traveled in his nation's roads or railways without fear of unwarranted interruption, by individuals who had temporary power in the Government. The spectre of American citizens being asked, by badge-wielding police, for identification, travel papers – in short a raison d'etre – is foreign to any fair reading of the Constitution, and its guarantee of human liberties. This is not Hitler's Berlin, nor Stalin's Moscow, nor is it white supremacist South Africa."

We agree. Historically, compelled identification was used most prominently to isolate and gather Jews in Germany and Nazi occupied territories before and during World War II. All German Jews were required to apply for identification cards by December 31, 1938, and were

required to carry those cards at all times.[9] The identification system "was a powerful weapon in the hands of the police. . . . It enabled police to pick up any Jew, anywhere, anytime. . . . Identification had a paralyzing effect on its victims. The system induced the Jews to be even more docile. . . . "[10] It was a society where "no one would escape. . . . Never before had so many people been identified so precisely, so silently, so quickly and with such far-reaching consequences. The dawn of the Information Age began at the sunset of human decency."[11]

In 1932, the USSR began requiring citizens to carry internal passports. The Soviet police, or *militsia*, maintained the system of passports that virtually everyone over the age of sixteen was required to have. In addition to standard demographic information, such passports also included employer's name, employment beginning and end dates, and criminal records.[12]

Beginning in 1958 for men, and in 1963 for women, the South African government required blacks to carry passes ("dompas") that prohibited their moving freely

[9] *See* RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 54 (1961).

[10] *Id.* at 58.

[11] EDWIN BLACK, IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION (2001), p. 104.

[12] *See* RONALD HINGLEY, THE RUSSIAN SECRET POLICE: MUSCOVITE, IMPERIAL RUSSIAN AND SOVIET POLITICAL SECURITY OPERATIONS (1971); *see also* AMY W. KNIGHT, THE KGB: POLICE AND POLITICS IN THE SOVIET UNION (1990).

about the country.[13] The official purpose of the pass was to allow the South African black to prove that he had the right to be present in a specific area.[14] Rwandan massacres of the Tutsi echoed the Holocaust, employing the "carte d'identite," developed when Rwanda was still a Belgian colony,[15] to distinguish Hutus from Tutsis with devastating effects.[16]

The existence of a national identity system does not mean a government will necessarily engage in human rights violations. Instead, it is a "facilitating factor, making it more possible for governments, local authorities or . . . militias to more readily engage in violations."[17] As Britain experienced after creating a national identification system for rationing in 1939, temptation by police officers to use it for routine law enforcement rose, with an increase of identification demands.[18] Protests over routine police

[13] ROGER OMOND, THE APARTHEID HANDBOOK: A GUIDE TO SOUTH AFRICA'S EVERYDAY RACIAL POLICIES, 122 (1986).

[14] *Id.*

[15] In a recent survey of countries' mandatory identification schemes, Austrian comparative law scholar and identity expert Eberhart Theuer stated that in Belgium and Germany carrying an identity credential is mandatory, though without penalty of arrest, while in Denmark not producing identification if there is a duty to do so, constitutes an arrestable offense punishable by fine. *See* Eberhart Theuer, Identity Checks, Subsequent Procedures and the Right to Anonymity in Europe (December 10, 2003) (unpublished manuscript).

[16] James Fussell, "Group Classification on National ID Cards as a Factor in Genocide and Ethnic Cleansing," Paper for the Yale University Genocide Series, November 15, 2001.

[17] *Id.*

[18] See Annie I. Anton, *National Identification Cards* (Dec. 17, 1996), available at http://www.cc.gatech.edu/computing/SW_Eng/people/Phd/id.html.

identification demands contributed to the discard of the national ID card when rationing ended.[19]

The historic abuses of identity demands and national IDs in Nazi Germany and in other 20th century régimes are mirrored today by uses in North Korea, Iran, Iraq, Myanmar, and China of registration, identity demands, and cards for social and population control. Used initially for social services, identification schemes can breed movement control and ultimately abuse.[20]

In stark comparison, government attempts to impose national identification on New Zealand or Australia citizens have been vociferously opposed.[21] Numerous democratic countries, including Sweden, Norway, South Korea, and India do not have national IDs.[22] At best, national identification schemes beget an ever increasing demand for that identification, for increasingly routine and mundane aspects of daily life. At worst, compelled identification can proliferate into a downward spiral of full-fledged systems of social control, and ultimately, oppression. "History demonstrates that the adoption of repressive measures, even to eliminate a clear evil, usually results only in repression more mindless and terrifying than the evil that prompted them. Means have a disturbing

[19] *See* Donna Seaman, *Identity Cards; Trumped Again*, ECONOMIST, Feb. 5, 1994, at 61.

[20] *See* Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 HARV. J. LAW & TEC 319, 343-49 (2002).

[21] *See* Robert Ellis Smith, *A National ID Card Violates American Traditions*, PRIVACY J., Mar. 1991, 1, 2, 36.

[22] *Id.* at 41.

tendency to become the end result." *Bostick v. State*, 554 So. 2d 1153, 1158-1159 (Fla. 1989).

V. A Bright Line Rule Will Help Citizens Know and Defend Their Rights.

Citizens encountering police face hard choices. Their dilemma is whether or not to assert rights such as refusal to consent, assuming they are even aware of such rights. If they assert their rights incorrectly, they may be arrested and prosecuted for disobeying lawful orders. If they assert no rights and meekly follow orders, they may consent to an embarrassing or incriminating search they could otherwise have refused. If they assert their rights correctly, especially with vigor, they may be deemed "suspicious," receiving additional police attention, and possible punishment. A bright line rule would help all parties know the parameters of the encounter, promoting individual rights and minimizing officer mistakes and liability.

People are afraid to assert their rights to police officers. This is so, in large part, because officers "are cloaked with special authority and obvious power."[23] Confronting an officer is fundamentally different from confronting another pedestrian. "There is authority in the approach of the police, and command in their tone. I can ignore the ordinary person, but can I ignore the police?"[24]

[23] Sykes & Clark, *Deference Exchange in Police-Civilian Encounters, in* POLICE BEHAVIOR: A SOCIOLOGICAL PERSPECTIVE 91 (J. Lundam ed. 1980).

[24] Charles A. Reich, *Police Questioning of Law Abiding Citizens*, 75 YALE L. J. 1161, 1162 (1966).

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Empirical evidence confirms this assertion. In a study of 300 field stops in Chicago, Illinois, every person answered the officer's questions – no one refused.[25] "The only conclusion is that the presence of a police officer, no matter how pleasant his demeanor, implies the potential use of force – force at least to effectuate the stop if not to compel the answers."[26] As noted in *State v. Kerwick*, "[t]his court would ill-expect any citizen to reject, or refuse, to cooperate when faced with the trappings of power like badges and identification cards. And these officers know that – that is one reason that they display those trappings." 512 So. 2d 347, 348-49 (Fla. App., 1987).

In *Miranda v. Arizona*, the Court quoted with approval, "It is probable that even today, . . . there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not." 384 U.S. 436, 468 n.37 (1966) (quoting Lord Devlin, THE CRIMINAL PROSECUTION IN ENGLAND 32 (1958)). Indeed, another reason why people fail to assert their rights is because they fear that to do so would be futile. "In the real world, people are afraid of the power of the police and want to minimize the chances of that power being asserted over them. People do not assert their rights because they know the police are not always respectful of those rights."[27]

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[25] *See* Wayland Pilcher, *The Law and Practice of Field Interrogation*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 465, 491 (1967).

[26] *Id.* at 473.

[27] Tracey Maclin, *Seeing the Fourth Amendment from the Backseat of a Police Squad Car*, 70 B.U.L. REV. 543 (1990) (reviewing H. RICHARD UVILLER, TEMPERED ZEAL (1988)).

Belief that asserting rights will create further suspicion is also a concern.[28] Such concern is well-advised, as evidenced in the recent case of *Graves v. City of Coeur D'Alene*, 339 F.3d 828 (9th Cir. 2003). In that case, officers at an Aryan Nation parade were persistently performing consent searches on pedestrians' bags. *Id.* at 835. Plaintiff Crowell was asked several times to submit to a consent search of his backpack, but he refused each time, and continued walking about the area. Crowell was approached again by an officer, who noted that Crowell was carrying a heavy bag containing cylindrical objects, but not otherwise suspicious. The officer continued to demand Crowell consent to a search, and Crowell continued to refuse, asserting his Fourth Amendment rights increasingly loudly to officers and the "crowd of media people" nearby. *Id.* at 836. The officer ultimately arrested Crowell for refusal, citing "the tension in the air just getting thicker and thicker around me, which I did not want" as his justification. *Id.* Crowell was arrested for refusing to consent to a search in front of the media. His bag contained peanut butter. Though the Ninth Circuit upheld his rights, it refused to grant him relief against the officers who violated his rights.

Justice Stewart explained that "[t]he inevitable result of the Constitution's prohibition against unreasonable searches and seizures and its requirement that no warrant issue but upon probable cause is that police officers who obey its strictures will catch fewer criminals. That is not a political outcome impressed upon an unwilling citizenry by unbeknighted judges. It is the price the framers anticipated

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[28] *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.1, at 259-60 (1975) (citations omitted).

and were willing to pay to ensure the sanctity of the person, the home, and property against unrestrained governmental power."[29]

In recent cases, this Court has seemingly suggested that citizens' rights are protected by the rule that refusal to cooperate, without more, may not raise the level of suspicion during a police encounter. *See, e.g., Florida v. Bostick*, 501 U.S. 429. This Court has given insufficient recognition to the realities of police encounters. *Amici* respectfully ask the Court to consider the stressful and unnerving situation that a police encounter presents to even the most law-abiding citizen. This Court should aid citizens by enforcing the rights that they already possess: a bright line rule that identification may not be compelled. Such a rule is the only way to breathe life back into the citizen's essential, but much abused, right to say "no."

CONCLUSION

If citizens are required to identify themselves by name during a *Terry* stop today, little prevents the government tomorrow from expanding its notion of identity to include any fact which makes up the bundle of what society generally terms "identity." If Americans must produce credentials, nothing prevents officers from recording those credentials, and entering or retrieving data based upon them. Rights should be affirmed, not abridged, by this Court. Americans have a fundamental right to wander

[29] Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1393 (1983).

inside this country, to be left alone, and to speak or remain silent, all without the government's permission. Compelled identification during *Terry* encounters will undermine these freedoms with potentially devastating effects. The only clear way this Court can protect its citizens is not by subjecting them to yet another encroachment on their liberties, but by giving them the proper tool to enforce their rights: a bright line rule that identification may not be compelled.

Respectfully submitted,

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IN THE

Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

v.

SIXTH JUDICIAL DISTRICT COURT OF NEVADA, HUMBOLDT COUNTY, ET AL.,

Respondent.

BRIEF OF AMICI CURIAE ELECTRONIC PRIVACY INFORMATION CENTER (EPIC) AND LEGAL SCHOLARS AND TECHNICAL EXPERTS

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INTEREST OF THE AMICI CURIAE [1]

The Electronic Privacy Information Center ("EPIC") is a public interest research center in Washington, D.C. that was established in 19994 to focus public attention on emerging civil liberties issues. EPIC has participated as *amicus curiae* in numerous privacy cases, including *Doe v. Chao*, No. 02-1377 (2003), *Smith v. Doe*, 123 S. Ct. 1140 (2003), *Dep't. of Justice v. City of Chicago*, 123 S. Ct. 1352 (2003), *Watchtower Bible and Tract Soc'y of N.Y. Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002), and *Reno v. Condon*, 528 U.S. 141 (2000).

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SUMMARY OF THE ARGUMENT

A name is now no longer a simple identifier: it is the key to a vast, cross-referenced system of public and private databases, which lay bare the most intimate features of an individual's life. If any person can be coerced by the state to hand over this key to the police, then the protections of the Fourth and Fifth Amendments have been rendered illusory.

The compelled disclosure of personal identification is central to the Court's consideration of this case. Critical to understanding the full consequences of providing identifying information to the police in the modern era is a close examination of the government databases and legal authority that now exists in the United States. Today the police have the ability to peruse increasingly sophisticated computer databases containing information wholly unrelated to the reason for an initial police stop.

Information systems that are currently available to the police, or may soon become available, include the National Crime Information Center ("NCIC"), the Multi-State Anti-Terrorism Information Exchange ("MATRIX"), the United States Visitor and Immigrant Status Indicator Technology System ("US-VISIT"), the Driver And Vehicle Information Database ("DAVID"), and the Transportation Workers Identification Credential ("TWIC").

Routine police access to these systems present a range of potential problems. Specifically, the record inaccuracies in the NCIC have been further compounded by the recent decision of the Department of Justice to exempt the record system from the data quality requirements of the Privacy Act, even after the Court's opinion in *Arizona v. Evans*, 514 U.S. 1 (1995), which raised concern about police reliance on faulty data systems.

The MATRIX system raises such troubling privacy concerns, for example, by integrating information from private sector and public sector record systems apparently without regard to the application of state privacy law, that several of the original state partners have withdrawn from the multi-state network project.

US-VISIT, a system of biometric identification originally intended for use by border control officials at ports of entry to the United States, will now enable law enforcement officers routinely to identify individuals, including students on university campuses, within the country.

DAVID, a record system built on motor vehicle information, gives the police rapid access to information that is subject to state and federal privacy law. The DAVID system is evolving rapidly from a government database intended to enforce motor vehicle laws to a general purpose system of identification that could be used routinely in police stops.

Finally, TWIC is an elaborate identification system that will provide police an extensive database of information about individuals who work in the transportation sector.

These systems raise significant Fourth Amendment and Fifth Amendment concerns and implicate individual liberty. The compelled production of personal identification now permits the government to engage in a far more extensive search of personal information stored in government databases than was ever contemplated in *Terry* v. *Ohio*, 392 U.S. 1 (1968). Further, the mere fact of a police stop may now create a transaction record that will be stored in government record systems, regardless of whether an arrest occurs. While it may be appropriate in the context of a lawful stop of a motor vehicle for the police to determine whether the vehicle is lost or stolen or whether there are

outstanding warrants for the driver, it would not be appropriate for the police to conduct such a search of an individual prior to an arrest.

It should be anticipated that the police will obtain ever more efficient systems to monitor and track individuals through interconnected databases. The Supreme Court has repeatedly cautioned that there may come a time when clear safeguards, rooted in the Fourth and Fifth Amendments, on the use of such systems should be established. *See, e.g., Whalen v. Roe*, 429 U.S. 589, 607 (1977) (Brennan, J., concurring) ("The central storage and easy accessibility of computerized data vastly increase the potential for abuse of that information, . . ."). That time has now come.

Given the extraordinary scope and capability of these new systems, which could easily become systems of mass public surveillance, *amici* believe it is critical for the Court to oppose the coerced disclosure of identity and to ensure that the police do not use a *Terry* stop for an unbounded fishing expedition of government computer databases.

ARGUMENT

Police officers today have access to an extraordinary range of detailed personal information in government databases that could easily give rise to further investigations unrelated to the reasons for the initial detention. Moreover, much of the information contained in these databases is often inaccurate and unreliable. Some of the information is obtained from private record systems and was never intended to be used for law enforcement purposes.

In this context, the compelled disclosure of actual identity in circumstances where probable cause to arrest is lacking raises significant Constitution concerns. The scope and problems associated with the government record systems described below underscore the need for the Court to ensure

that an investigatory stop not become the basis for an extensive fishing expedition across government databases.

I. The National Crime Information Center

The National Crime Information Center ("NCIC") is a system that makes criminal history information widely available to police officers and law enforcement officials across the United States. *See generally* Bureau of Justice Statistics, *Report of the National Task Force on Privacy, Technology and Criminal Justice Information*, NCL 187669, at 47 (Aug. 2001);[2] *see also* Press Release, Federal Bureau of Investigation (July 15, 1999).[3]

The Attorney General has the authority to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records" and "exchange such records and information with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions." 28 U.S.C. § 534 (2002). Furthermore, information can be entered into the system by either federal or state authorities. *Id.* A non-exhaustive list of information that Congress envisioned the NCIC to contain includes "arrests, convictions, and arrest warrants for stalking or domestic violence or for violations of protection orders for the protection of parties from stalking or domestic violence; and protection orders for the protection of persons from stalking or domestic violence, provided such orders are subject to periodic verification." *Id.*

[2] *Available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rntfptcj.pdf (last visited Nov. 24, 2003).

[3] *Available at* http://www.fbi.gov/pressrel/pressrel99/ncic2000.htm (last visited Nov. 24, 2003).

A. Establishment of the NCIC

The FBI established the predecessor to the NCIC in 1967 "to provide a nationwide, user-orientated computer response for criminal justice records." Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update*, NCJ 187670 at 26 (Dec. 2001) [hereinafter "BJS Report"].[4] Today the NCIC is the most extensive criminal history record systems in the United States. "[M]ore than 59 million individual offenders were in the criminal history files of the State central repositories as of December 31, 1999." *Id.* at 30. "At the Federal level, the FBI's Criminal Justice Information Services ("CJIS") Division maintains automated, fingerprint-based criminal history record information with respect to more than 43 million individuals in [the Interstate Identification Index]." *Id.* at 31.

Identification information available typically includes an individual's name, address, date of birth, Social Security Number, sex, race and physical characteristics. *Id.* at 28-29. These databases may also include an individual's place of employment, automobile registration, fingerprints, criminal history information, and juvenile record information, among other identifiers. *Id.* However, the BJS Report cautions that "name searches are not fully reliable and existing criminal record files may be inaccurate and incomplete, particularly with respect to case disposition information." *Id.* at 21.

B. Ongoing Concerns About NCIC Record Accuracy

In 1995, the Court upheld the use of evidence obtained from an erroneous arrest record (the product of a clerical error), but Justice O'Connor wrote separately to

[4] A*vailable at* http://www.ojp.usdoj.gov/bjs/pub/ascii/umchri01.txt (last visited Nov. 24, 2003).

express concern about reliance on error-prone recordkeeping systems. *Arizona v. Evans*, 514 U.S. 1, 16-17 (1995) (O'Connor, J., concurring). Justice O'Connor explained:

> [w]hile the police were innocent of the court employee's mistake, they may or may not have acted reasonably in their reliance *on the recordkeeping system itself*. Surely it would *not* be reasonable for the police to rely, say, on a recordkeeping system, their own or some other agency's, that has no mechanism to ensure its accuracy over time and that routinely leads to false arrests, even years after the probable cause for any such arrest has ceased to exist (if it ever existed).

Id. at 17 (emphasis in original).

Nonetheless, the recent Bureau of Justice Statistics report identifies ongoing concerns about the accuracy and reliability of NICIC records. According to the BJS report, "inadequacies in the accuracy and completeness of criminal history records is *the single most serious deficiency* affecting the Nation's criminal history record information system." BJS Report at 38 (emphasis added). Moreover, if incomplete or inaccurate records are used "there is a substantial risk that the user will make an incorrect or misguided decision." *Id.* Because the criminal history information is available to both private and public entities, misguided decisions may lead to an unjustified arrest, a lost employment opportunity, or inability to purchase a firearm. *Id.*

There have not been many "in-depth audits or reviews of the accuracy of the information maintained by State and Federal criminal history record repositories" conducted, according to the report, but "most of those that have been conducted have found unacceptable levels of inaccuracies." *Id.* at 39.

The problem of NCIC record accuracy has been compounded by recent actions of the Department of Justice. In March 2003, the Justice Department exempted the NCIC from numerous mandates established by the Privacy Act, 5 U.S.C. § 552a, most notably accuracy requirements. Privacy Act of 1974; Implementation, 68 Fed. Reg. 14140 (March 24, 2003) (codified at 28 C.F.R. pt. 16). As a result of this exemption, the FBI need not comply with 5 U.S.C. § 552a(e)(5), which requires an agency to "maintain all records which are used by the agency in making any determination about an individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual[.]" 28 C.F.R. § 16.96(g)(1). The NCIC is also exempt from 5 U.S.C. § 552a(e)(1), which requires that a system of records contain "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency[.]" *Id.*

On the state level, the types and completeness of records included in the NCIC vary significantly depending on each state's resources. BJS Report at 31. The BJS Report finds that "there is still substantial variation among disposition reporting requirements." *Id.* at 35. For example, "[t]hirty-two States require law enforcement agencies to notify the State central repository when an arrest person is released without formal charging after fingerprints have been sent to the repository, while 19 jurisdictions have no such requirement." *Id.* In the thirty-two states that recorded such information, up to 40 percent of arrests within the five years preceding the BJS Report did not list the final dispositions. *Id.* at 38.

This inconsistency may cause certain non-reporting state systems to reflect an arrest that may have been unjustified, with no indication of the result. The false report of an arrest is important because, as the Court emphasized in

Terry, "[a]n arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons" because "[a]n arrest is the initial stage of a criminal prosecution . . . and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows." 392 U.S. 1, 26 (1968).

Duplicate records are also a problem, as are diverse formats and differences in content. BJS Report at 39, 41. Duplicate records stem from false names and clerical errors, while differences in content and format are a result of varying technological and legal schemes that the various states have adopted. *Id.*

The NCIC operates a private telecommunications system throughout the nation. *Id.* at 27. The FBI receives input for the system from "criminal justice agencies at every level of government—Federal, State, and local—and at each stage of the criminal justice system—by police departments, prosecutors, courts, and corrections agencies." *Id.* at 32. Efforts are underway to create a "nationwide telecommunications system that will permit the electronic exchange of criminal history information and related graphics throughout the country in a paper-free 'lights out' environment." *Id.* at 33. While online access to NCIC information varies by jurisdiction, terminals can either be in a centralized location, such as the police station house, or in moveable locations, such as police cars. *Id.* at 36.

As a result, police officers across the country have routine access to the NCIC, but the ongoing concerns about data quality, coupled with the extensive records that are made available, mean that a routine query to the NCIC could produce inaccurate information or information unrelated to the reason for the stop.

II. The Multi-State Anti-Terrorism Information Exchange (MATRIX)

The Multi-State Anti-Terrorism Information Exchange ("MATRIX") is a state-run database system intended to allow law enforcement agencies in participating states to analyze information from multiple criminal and public record sources in near-real time, through a single web-based query. It is an example of the type of record system that seeks to link together a wide range of public and private record systems that will then be made available to law enforcement agents in the field. So little attention has been given to privacy concerns that several of the original state partners recently have withdrawn from the MATRIX project.

MATRIX uses a data mining system called "Factual Data Analysis" to analyze public and private data sources. MATRIX was developed by the Florida Department of Law Enforcement ("FDLE") and a private company, SeisInt, Inc., and is already utilized by 1,000 law enforcement agency users in Florida. Letter from Fla. Dep't of Law Enforcement Commissioner Guy Tunnel to Fla. Today Editorial Editor John Glisch (Oct. 30, 2003).[5]

FDLE Commissioner James Moore has hailed MATRIX as the first step in developing "a national (not federally controlled) intelligence network." FDLE Commissioner James Moore, Remarks to Fla. Sheriffs Winter Conference (Jan. 26, 2003).[6]

A. Operation of MATRIX

MATRIX is implemented over a criminal justice network, the Regional Information Sharing System Network

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[5] *Available at* http://www.fdle.state.fl.us/osi/DomesticSecurity1103/ MATRIX.htm (last visited Nov. 24, 2003).

[6] *Available at* http://www.fdle.state.fl.us/publications/speeches/20030126_fl_sheriffs_conf.pdf (last visited Nov. 24, 2003).

("RISSNET"). RISSNET connects 5,700 law enforcement agencies in fifty states and the District of Columbia. *MATRIX and ATIX: Information Programs Developed in Response to September 11, 2001*, Ga. Homeland Security Bulletin No. 20-03 (Ga. Office of Homeland Security), Aug. 1, 2003 at 1[7]; Institute for Intergovernmental Research, *MATRIX Program Objectives #2*.[8] MATRIX will provide access to other web-enabled "document storage systems" similar to those found on RISSNET. *Id.*

MATRIX is operated by a private company, SeisInt, Inc. The personal data is stored on computers owned and operated by SeisInt. This has raised significant concerns about compliance with state privacy laws. *See, e.g.*, Press Advisory, Thurbert Baker, Ga. Attorney General, Attorney General Baker Declares Transfer of Driver information to MATRIX Database Illegal (Oct. 20, 2003).[9]

The MATRIX database includes personal information obtained from public information and private databases. The combined database provides access to an extraordinary range of personal information. Available documentation indicates that the MATRIX system currently includes:

1. Criminal history
2. Driver license information
3. Vehicle registration
4. Incarceration/corrections records
5. Digitized photographs

[7] *Available at* http://www.gahomelandsecurity.com/bulletins/2003/August%2003/20-03%20August%201.pdf (last visited Nov. 24, 2003).

[8] *Available at* http://www.iir.com/matrix/objectives_2.htm (last visited Nov. 24, 2003).

[9] *Available at* http://www.state.ga.us/ago/press/press.cgi?prfile=PR.20031020.01 (last visited Nov. 24, 2003).

6. Investigative data
7. Property ownership
8. Address history
9. Marine vessel registration
10. U.S. directory assistance
11. Public utility service connections
12. Bankruptcies
13. Liens and judgments
14. UCC filings
15. U.S. domain names
16. Concealed weapons permits
17. DEA controlled substances licenses
18. FAA aircraft and pilots licenses
19. Federal firearms and explosives licenses
20. Hunting and fishing licenses
21. Professional licenses
22. Voter registration

Ga. Office of Homeland Security, *supra;* Institute for Intergovernmental Research, *MATRIX Program Objectives #1; see* Press Release, SeisInt, Inc., AccurInt Arms Law Enforcement.[10]

MATRIX also includes searchable image data. These digitized images are associated with personal information. FDLE Planning Consultant Hopkins, *supra*. MATRIX image data include visual mapping data and individuals' pictures. MATRIX can generate "photo 'line-ups'" from an investigative query. Ga. Office of Homeland Security, *supra*. MATRIX may also be used for visual mapping, which means that an investigator would find a list of all persons who had lived at a requested address. *Id.*

MATRIX is funded partially by the Department of Justice, Office of Justice Programs, Bureau of Justice

[10] *Available at* http://www.accurint.com/images/law.pdf (last visited Nov. 24, 2003).

Assistance through a $4 million grant. *Data Mining: Current Applications and Future Possibilities. Hearing before the House Subcomm. on Tech., Info. Policy, Intergovernmental Relations and the Census, Comm. on Gov't Reform,* 108th Cong. (2003) (testimony of Hon. Paula B. Dockery, Fla. State Senator) at 5.[11] The grant to the Florida-led state consortium was for database integration, hardware, software, and network support. Institute of Intergovernmental Research, *MATRIX Overview.*[12] The Department of Homeland Security has pledged a further $8 million towards the project. Robert O'Harrow, Jr., *U.S. Backs Florida's New Counterterrorism Database: 'Matrix' Offers Law Agencies Faster Access to Americans' Personal Records,* Wash. Post, Aug. 6, 2003, at A1 ("Police in Florida are creating a counterterrorism database designed to give law enforcement agencies around the country a powerful new tool to analyze billions of records about both criminals and ordinary Americans.")

B. Privacy Concerns Have Led States to Withdraw from MATRIX

Thirteen states originally agreed to participate in MATRIX: Alabama, Connecticut, Florida, Georgia, Kentucky, Louisiana, Michigan, New York, Oregon, Pennsylvania, South Carolina, Ohio, and Utah. Ga. Office of Homeland Security, *supra*; *see* Fla. State Senator Dockery, *supra at* 5. Six states (Alabama, Georgia, Kentucky, Louisiana, Oregon, South Carolina) have dropped out citing a variety of privacy and budget concerns. Ariel Hart, *National Briefing: South: Georgia Pulling Out of Terror Database,*

[11] *Available at* http://reform.house.gov/UploadedFiles/Dockery.pdf (last visited Nov. 24, 2003).

[12] *Available at* http://www.iir.com/matrix/overview.htm (last visited Nov. 24, 2003).

N.Y. Times, Oct. 23, 2003, at A26;[13] *see also* Press Release, Ga. Governor Sonny Perdue, Statement of Governor Perdue Regarding the MATRIX Database (Oct. 21, 2003).[14]

Georgia has ceased participation in MATRIX specifically because of privacy concerns over compliance with state privacy laws. Ga. Att'y Gen. Baker, *supra*. Georgia Attorney General Thurbert Baker found that regular transfer of Georgia driver information to FDLE would violate Georgia state laws limiting transfer of data in the driver information database. *Id.* Under Georgia state law, driving records may be transferred only in response to a specific allegation of criminal conduct or unlawful activity. *Id* (applying O.C.G.A. § 40-5-2(c)(1)(D)). In a public statement ending Georgia's participation in MATRIX, Governor Sonny Perdue also expressed "serious concerns about the privacy interests involved" and withheld further transfer, even if lawful, of any state records to MATRIX. Ga. Governor Perdue, *supra*; *see also* Ga. Att'y Gen. Baker, *supra*.

C. MATRIX Data Will Be Available to Police Officers on the Street

According to the planning documents, MATRIX will provide a "mechanism for local officers to share important information they collect 'on the street' with other law enforcement agencies." Institute for Intergovernmental Research, *MATRIX Program Objectives #3.*[15] The Georgia Homeland Security Bulletin describes the MATRIX as being

[13] *Available at* http://query.nytimes.com/gst/fullpage.html?res=950DE1D61731F930A15753C1A9659C8B63 (last visited Dec. 12, 2003).

[14] *Available at* http://www.gov.state.ga.us/document.asp?doc=press/press279 (last visited on Nov. 24, 2003).

[15] *Available at* http://www.iir.com/matrix/objectives_3.htm (last visited Nov. 24, 2003).

able to identify and locate persons "with minimal input and the push of a button." Ga. Office of Homeland Security, *supra*. Further, "investigative queries and analyses may be done in 'real time,'" and "requests that previously took hours, days or week [sic] now take seconds." Ga. Office of Homeland Security, *supra*; *see* Fla. State Senator Dockery, *supra* at 5; Ga. Bureau of Investigation Director Keenan, *supra*. *See generally* Institute of Intergovernmental Research, *MATRIX Home*.[16] Further, the Georgia Homeland Security Bulletin states that use of the MATRIX system in Florida provided "breakthroughs at speeds that otherwise would not have been possible." Ga. Office of Homeland Security, *supra*.

Officials explain that MATRIX is not a surveillance system, and safeguards exist to protect privacy. But there is no probable cause requirement in the FDLE Guidelines for use of MATRIX. FDLE Guidelines require only reasonable suspicion for releasing analyzed data for investigation. *Id*. at 3. Moreover, reasonable suspicion is not required for the MATRIX system to analyze data internally, since some analysis processes run automatically. *Id*. at 4. In applying the "Factual Data Analysis" component of MATRIX towards terrorist investigation, Florida uses private data mining entities to analyze public data records using law enforcement-defined criteria to produce a "probability score for criminal behavior." Fla. State Senator Dockery, *supra* at 4. These scores direct law enforcement officials to "locate, target, and monitor" subjects. *Id*. at 4. The same process is used by the FDLE Financial Crime Analysis Center to analyze data to

[16] *Available at* http://www.iir.com/matrix (last visited Nov. 24, 2003); *see also* SeisInt, Inc. *at* http://www.accurint.com/images/law.pdf (last visited Nov. 24, 2003).

identify suspicious financial activity for further investigation. *Id*. at 3.

Web sites are being developed to disseminate MATRIX data to law enforcement agencies and local officers. FDLE Commissioner James Moore, Remarks to Information Processing Interagency Conference (March 4, 2003);[17] *MATRIX Program Objectives #3*.

III. Driver and Vehicle Information Database (DAVID)

The Driver and Vehicle Information Database ("DAVID") is an integrated database that provides law enforcement access to driver information based on name or vehicle information to Florida criminal justice officers, available over common web browsers. DAVID can be accessed by officers in patrol cars through mobile data terminals, and is used in traffic stops. *See* Fla. Highway Patrol, *Laptop Gives Trooper the Edge* (trooper accessed DAVID through Mobile Data Terminal during traffic stop).[18] DAVID contains descriptive and statistical vehicle data, as well as historical driver license data. Fla. Dep't of Highway Safety and Motor Vehicles, DAVID Brochure [hereinafter "DAVID Brochure"];[19] *see* Fla. Dep't of Highway Safety and Motor Vehicles, Dr ers License Homepage.[20] It is capable of retrieving driver records based on name, tag number, or VIN number. DAVID may further retrieve records from partial, fragmented information of each type. DAVID Brochure.

[17] *Available at* http://www.fdle.state.fl.us/publications/speeches/20030304_gitec.pdf (last visited Nov. 24, 2003).

[18] *Available at* http://www.fhp.state.fl.us/html/photogallery/Laptops031103.html (last visited Nov. 25, 2003).

[19] *Available at* http://casey.hsmv.state.fl.us/intranet/ddl/AAMVA/david.pdf (last visited Nov. 23, 2003).

[20] *Available at* http://casey.hsmv.state.fl.us/intranet/ddl/AAMVA/aamva.html (last visited Nov. 23, 2003).

The Florida Department of Highway Safety and Motor Vehicles ("FDHSMV") has stated that the goal of DAVID is to develop the driver's license information database into a "multi-engine analytical engine" for "integrated homeland security, public safety, intelligence gathering, and investigations." *See* Fla. Dep't of Highway Safety and Motor Vehicles, DHSMV Data Warehouse.[21] Currently, the data within DAVID is already shared with the Florida Department of Law Enforcement ("FDLE"). *Id.*; Susan Lambert, Director, Fla. Division of Drivers Licenses, Connecting the Dots with Integrated Services, Presentation to American Association of Motor Vehicle Administrators 19 [hereinafter "Connecting the Dots Presentation"].[22] FDHSMV provides FDLE with daily updates and a list of non-citizens with false identification. *Id.* at 21.

The FDHSMV is planning to share DAVID information with a variety of criminal justice entities and non-criminal justice entities, *e.g.*, Florida County Tax Collectors, Florida County Sheriffs, Supervisors of Elections, Department of Agriculture and Consumer Services, Department of Education, Department of Revenue, Department of Financial Services. *Id.* at 20.

DAVID is accessible via CJNet, a private data network comprising criminal justice agencies. Fla. Dep't of Law Enforcement, *Successful use of technology to improve public safety: CJNet;*[23] *see* DAVID Brochure. CJNet is itself based on an older private criminal justice network, the Florida Criminal Information Center (FCIC) network, and

[21] *Available at* http://casey.hsmv.state.fl.us/intranet/ddl/AAMVA/warehouse.pdf (last visited Nov. 23, 2003).

[22] *Available at* http://casey.hsmv.state.fl.us/intranet/ddl/AAMVA/AAMVAconf2003ppt2000.ppt (last visited Nov. 23, 2003).

[23] *Available at* http://www.fdle.state.fl.us/Publications/tech_success_ stories/cjnet.htm (last visited Nov. 23, 2003).

run by the FDLE. The FDLE, which runs CJNet, is the same Florida agency that oversees the MATRIX system. *See* Institute of Intergovernmental Research, *MATRIX Overview*. CJNet is also the infrastructure by which the MATRIX system is made available to Florida criminal justice agencies. Criminal and Juvenile Justice Information Systems (CJIS) Council, Minutes of Meeting at 6 (Feb. 28, 2003), (unanimous vote supporting pilot project linking CJNet and MATRIX backbone).[24] It connects to RISSNet, a national, federally funded criminal justice information network. In this manner, data within CJNet (including DAVID) is made available as another data source that would be searchable through a single query to the MATRIX system. *See id.*

DAVID contains current and historical data for any driver's license. It contains the current status of a particular driver's license, current picture, current demographics, current address, and any conditional messages (*e.g.*, "sex offender") attached. DAVID Brochure; Connecting the Dots Presentation at 15. Historical data of the drivers' license is also available, including past histories of personal information, renewal, restrictions, endorsements, and complete driving history. *Id.*

DAVID also retains historical photo data from past image captures, meaning "DAVID maintains photographic evidence of what a person looks like over a broad span of time." DAVID Brochure; Connecting the Dots Presentation at 12. DAVID also stores any foreign ID documents used in applying for a driver's license or ID card. DAVID Brochure; Connecting the Dots Presentation at 14. Foreign nationals applying for temporary driving permits in Florida are required to have their passports scanned into DAVID.

[24] *Available at* http://www.fdle.state.fl.us/CJJISCouncil/minutes/FINAL%20minutes%202-28-03.pdf (last visited Nov. 23, 2003).

Freeman v. Florida Dep't of Highway Safety and Motor Vehicles, No. 2002-CA-2828 at 12 n.9 (Fla. Cir. Ct. June 6, 2003).

A. DAVID is Readily Accessible to Law Enforcement Agents

DAVID requests can be made from a mobile data terminal installed in patrol cars. *See Laptop Gives Trooper the Edge, supra* (trooper accessed DAVID through mobile data terminal during traffic stop). DAVID allows criminal justice officers to access personal information based on only a name, personal information, a tag number, or a Vehicle Identification Number. Connecting the Dots Presentation at 5. Specifically, DAVID allows a user to search for a person's information based on name, Florida driver's license number, foreign document type, Social Security number, vehicle license tag number, Vehicle Identification Number (VIN), or fragmented data. Connecting the Dots Presentation at 5-7; *see* DAVID Brochure; *Laptop Gives Trooper the Edge, supra.*

DAVID allows law enforcement agents in the field to see all related documents for a particular search. For example, when searching for a vehicle record, a user is able to view the personal information of each driver associated with it, and vice versa. Connecting the Dots Presentation at 15. Further, a search for an individual discloses all cars associated with him, and provide access to the personal information of any other persons associated with those cars. *Id.*

B. The DAVID System Raises Substantial Privacy Concerns

DAVID makes extensive use of motor vehicle records, including personal information. This is information that is subject to federal and state and privacy law. *See*

Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-2725; Fla. Stat. § 119.07(3)(aa) (2002). The Court expressly upheld the Driver's Privacy Protection Act in response to a challenge brought on federalism grounds. *Reno v. Condon*, 528 U.S. 141 (2000). Now it appears that the state of Florida will make this information available in real time to law enforcement officers on the street. Given the range of government agencies that may soon have access to DAVID, there is every reason to believe that law enforcement officers will access the DAVID system during routine steps of individuals unrelated to violations of motor vehicle laws.

IV. Transportation Workers Identification Credential (TWIC)

Government access to personal information in the context of a police stop will also be facilitated by the recent establishment of new systems of identification, such as the Transportation Workers Identification Credential ("TWIC"). TWIC was established run by the Transportation Security Administration ("TSA"). Aviation and Transportation Security Act of 2001, 49 U.S.C. § 114, 44903(g); Maritime Transportation Security Act, 46 U.S.C. § 70105; Transportation Worker Identification Credentialing (TWIC) System, 68 Fed. Reg. 49496, 49508 (Aug. 18, 2003); Transportation Safety Administration, *Transportation Worker Identification Credential (TWIC) Stakeholder Brief* at 3 (July 2003) (on file with EPIC) [hereinafter "TWIC Stakeholder Brief"].

TWIC is an identification card that is issued to transportation workers, authorized visitors, and all other persons requiring unescorted access to transportation infrastructure secure areas. 68 Fed. Reg. at 49508. Those seeking access to certain areas of airports, rail facilities, port facilities, port headquarters, and pipelines will require the

TWIC card to enter. A central TWIC database, run by TSA, stores personal information and validate a person's eligibility to enter these areas. TWIC Stakeholder Brief, *supra*. The central TWIC database will also run background checks and check a person's identity against other national "watch list" threat-intelligence databases. *Security Credentials for Port Personnel Before the House Committee on Transportation and Infrastructure, Subcommittee on Coast Guard and Maritime Transportation*, 107th Cong. (Feb. 13, 2002) (statement of Rear Admiral James Underwood); TWIC Stakeholder Brief, *supra*, at 10-11. Persons required to have TWIC identification cards will include foreign merchant mariners and foreign truck drivers. *Id*. TWIC stores data on an identification card carried by each transportation employee. *Id*.

These cards are required for entry through Access Control Points, which grant access to certain areas by matching the data stored on the card with data stored at the central TSA data center. *Id*. Access Control Points include vehicle gates, truck lanes, personnel turnstiles, building doors, and pedestrian entrances. *Id*.

The pilot project implementation of the TWIC database contains the following data elements:

Name
Address
Phone Number
Social Security Number
Date of Birth
Place of Birth
Administrative Identification Code
Unique Card Serial Number
Systems Identification Code
Company/Organization Affiliation
Issue Date
Biometric data

Photographic data
Access Level Information
Expiration Date

68 Fed. Reg. at 49508.

This data is stored at Regional Database and Issuance centers and a centralized TSA data center. TWIC Stakeholder Brief, *supra*, at 10-11. The central TSA data center matches individuals against persons appearing in national "watch list" database, and revokes access to all TWIC facilities from such persons. *Id*. at 12.

It is clearly anticipated that the TWIC record system will be made available to police officers on the street.[25] Moreover, the TWIC identification card, since it will be widely used by individuals in the transportation industry, could easily be the document that police would request in routine stops.

V. US-VISIT System

The most elaborate system of identification in the United States is currently being developed by the Department of Homeland Security ("DHS"). The United States Visitor and Immigrant Status Indicator Technology ("US-VISIT") is an integrated government-wide program intended to improve

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[25] According to the federal regulations, data within the TWIC database will be made available to "the appropriate Federal, State, local, . . . foreign, or international agency responsible for investigating, prosecuting, enforcing, or implementing a statute, rule, regulation, or order, where TSA becomes aware of an indication of a violation or potential violation of civil or criminal law or regulation . . . a Federal, State, local, . . . foreign, or international agency, where such agency has requested information relevant or necessary for the hiring or retention of an individual as an employee or a contractor . . . [and] international and foreign governmental authorities in accordance with law and formal or informal international agreement . . . " 68 Fed. Reg. at 49508.

the nation's capacity for collecting information on foreign nationals who travel to the United States, as well as control the pre-entry, entry, status, and exit of these travelers. General Accounting Office, *Homeland Security: Risks Facing Key Border and Transportation Security Program Need to be Addressed,* GAO-03-1083 (Sept. 2003) at 1.[26]

Congress initially directed the Attorney General to develop an automated entry and exit control system to collect records of arrival and departure from every foreign visitor entering and leaving the United States in Section 110 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified as amended at 8 U.S.C. § 1221 (1996)). Congress later amended and replaced Section 110 of IIRIRA with the Immigration and Naturalization Service Data Management Improvement Act ("DMIA") of 2000. Pub. L. No. 106-215, 114 Stat. 337 (2000) (codified as amended at 8 U.S.C. § 1365a (2000)). The DMIA directed the integration of existing Department of Justice and Department of State electronic foreign visitor arrival and departure databases, including those created at ports of entry and at consular offices. 8 U.S.C. § 1635a(b)(2).

The Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act of 2001 ("USA PATRIOT Act") and the Enhanced Border Security and Visa Entry Reform Act have significantly expanded the operation of the US-VISIT system. In the USA PATRIOT Act, Congress imposed a requirement for "speed" in the program's implementation and mandated that the DHS be consulted with respect to the establishment of the integrated entry and exit program. 8 U.S.C. § 1635a. The

[26] *Available at* http://www.gao.gov/new.items/d031083.pdf (last visited Nov. 24, 2003).

USA PATRIOT Act introduced the concept of biometrics to establish a technology standard that would be used in the development of the US-VISIT the System. Dep't of Homeland Security, *US-VISIT Q&As: Background Information.*[27]

The Enhanced Border Security Act ("EBSA") seeks to fully integrate all databases and data systems maintained by the Immigration and Naturalization Service that process or contain information on aliens. Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173 (2002) (codified as amended at 8 U.S.C. § 1722 (2002)). The EBSA expanded on the USA PATRIOT Act and the DMIA by increasing requirements for US-VISIT's integration, interoperability with other law enforcement and intelligence systems, biometrics, and accessibility. *See* Dep't of Homeland Security, *US-VISIT Q&As: Background Information*, footnote 6. Here Congress specifically mandated the establishment of a database containing the arrival and departure data from machine-readable visas, passports, and other travel and entry documents possessed by aliens. 8 U.S.C. § 1731(a)(2). By October 26, 2004, these travel and entry documents are also to include the use of biometric identifiers in accordance with domestic and international standards organizations. 8 U.S.C. § 1732(b)(1). The EBSA further required all carriers to transmit electronically the information of all visitors and crewmembers arriving and departing the United States by January 1, 2003. Furthermore, the information from the data systems the EBSA describes is to be readily available and easily accessible to any federal law enforcement or intelligence officer responsible for "the

[27] A*vailable at* http://www.dhs.gov/interweb/assetlibrary/USVISIT_QnA_102703.pdf (last visited Nov. 24, 2003).

investigation or identification of aliens." 8 U.S.C. § 1722(a)(5)(C).

A. Operation of US-VISIT System

Along with integrating various databases containing visitor information, US-VISIT will also scan, collect and use biometric identifiers such as fingerprints along with a digital photograph of the visitor. An inkless fingerprinting system will be used upon entry as U.S. Customs and Border Protection Officers review travel documents at Ports of Entry ("POEs"). As both of the visitor's index fingerprints are captured, a picture of the visitor will also be taken. Press Release, Dep't of Homeland Security, US-VISIT Fact Sheet (Oct. 28, 2003).

US-VISIT will also include the interfacing and integration of over twenty existing systems. One of the existing systems that is to be included in the initial implementation of US-VISIT is the Student Exchange Visitor Information System ("SEVIS"), a system that contains information on foreign students in the United States. GAO Homeland Security Report, footnote 1; Appendix I, 32-32.

Data elements of the US-VISIT system include the information made available through arrival and departure manifests. This information includes complete name, date of birth, citizenship, sex, passport number and country of issuance, country of residence, United States visa number, date, place of issuance (where applicable), alien registration number (where applicable), address while in the United States, and such other information that the Attorney General, in consultations with the Secretaries of State and Treasury, determines necessary for the enforcement of the immigration laws and to protect safety and national security. 8 U.S.C. § 1221(c).

The US-VISIT system relies on information provided by visitors traveling to the United States on visas, as opposed to those travelers coming to United States on the Visa Waiver Program ("VWP"). *See* Visa Waiver Permanent Program Act, Pub. L. No. 106-396, 114 Stat. 1637 (2000) (codified as amended at 8 U.S.C. § 1187 (2002)). However, by October 26, 2004, countries in the VWP are required by the USA PATRIOT Act to certify that they will issue their nationals machine-readable passports that incorporate biometric identifiers that comply with the standards established by the International Civil Aviation Organization. Dep't of Homeland Security, *Q&As: Visa Waiver Countries*, footnote 6.

The DHS has stated that the US-VISIT information is to be made available "only to authorized officials and selected law enforcement agencies responsible for ensuring the safety and security of U.S. citizens and foreign visitors." Press Release, Dep't of Homeland Security, DHS Unveils Technology for US-VISIT Entry and Exit Procedures (Oct. 28, 2003).[28] According to DHS, US-VISIT will be available to U.S. Customs and Border Protection Officers at POEs, special agents in the United States Immigration and Customs Enforcement, adjudications staff at U.S. Citizens Immigration Services offices, United States consular offices, and "appropriate federal, state, and local law enforcement personnel." Dep't of Homeland Security, *Q&As: Information Collection & Use* at 3, footnote 6.

However, the USA PATRIOT Act mandates that US-VISIT be able to interface with law enforcement databases to be used by federal law enforcement to identify and detain

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[28] *Available at* http://www.useu.be/Categories/Justice%20and%20Home%20Affairs/Oct2803USVISIT.html (last visited Nov. 24, 2003).

individuals who pose a threat to national security. 8 U.S.C. § 1635a note. The USA PATRIOT Act also requires that US-VISIT be accessible to all law enforcement and intelligence officers responsible for investigation and identification of aliens. 8 U.S.C. § 1379(3)(C). Under the Aviation and Transportation Security Act, the transmission of manifest information may be shared with other federal agencies, upon request, for the purposes of protecting national security. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 272 (2001) (codified as amended at 49 U.S.C. § 44909 (c)(2)(F)(5) (2001)).

Moreover, the Data Management Improvement Act of 2000 grants the Attorney General discretion to permit other federal, state, and local law enforcement officials to have access to the data contained in the integrated entry and exit data system for law enforcement purposes. 8 U.S.C. § 1635a(f)(2).

B. Missing Privacy Impact Assessment

The E-Government Act of 2002 requires federal agencies to conduct and publish privacy impact assessments (PIAs) before developing or procuring information technology that will collect or store personal information electronically. Electronic Government Act of 2002, Pub. L. No. 107-347, Title II, 116 Stat. 2910 sec. 208 (2002) (codified as amended at 44 U.S.C. § 3601 note (2003)). However, the DHS has failed to complete the PIA for the US-VISIT program. In the fiscal year 2002 report on expenditure planning for US-VISIT, the GAO made recommendations to the DHS regarding the need to develop this privacy impact assessment and a system security plan. General Accounting Office, *Information Technology: Homeland Security Needs to Improve Entry Exit System Expenditure Planning*, GAO-03-563 (June 9, 2003). In fiscal year 2003 expenditure plans, the

GAO reported that the DHS has not yet implemented these recommendations. *See* Press Release, Senate Committee on Governmental Affairs, DHS Violates Privacy Impact Requirements with US VISIT Technology (Dec. 4, 2003).[29]

C. Dramatic Expansion of US-VISIT

After unveiling US-VISIT on October 28, 2003, the DHS now plans to implement US-VISIT at United States air and seaports starting January 5, 2004. US-VISIT will be placed at 115 airports and 14 major seaports by early 2004. Land borders will be phased into US-VISIT throughout 2005 and 2006. International Information Programs Press Release, U.S. Dep't of State, *New Entry-Exit System for Visitors to U.S. Will Be Fast and Effective* (Oct. 28, 2003).[30] The US-VISIT program received $380 million for fiscal year 2003 and has been appropriated $330 million for fiscal year 2004. Press Release, Dep't of Homeland Security, US-VISIT Fact Sheet (2003), footnote 12.

Coordinated efforts, embodied in several pieces of legislation, to enhance immigration procedures and to develop and implement an integrated entry and exit program at all points of entry in the United States is about to become a reality. US-VISIT will integrate data from a variety of data systems and add biometric identifiers of all visitors to the system, but the scope of use of the information within this collective system is still not clear. Thus far, the DHS has failed to complete a privacy impact assessment. The Attorney General possesses broad discretionary powers to allow law enforcement access to this record system.The expansive

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[29] *Available at* http://www.senate.gov/~gov_affairs/index.cfm?FuseAction=PressReleases.Detail&Affiliation=R&PressRelease_id=599&Month=12&Year=2003 (last visited Dec. 12, 2003).

[30] *Available at* http://usinfo.state.gov/topical/pol/terror/texts/03102807.htm (last visited Nov. 24, 2003).

purpose of "investigative and identification" leaves open serious questions as to whether US-VISIT, a border control system, will be used routinely on the streets of the America.

CONCLUSION

The technology of government databases has changed dramatically since the Court held in 1968 that police may detain a person and conduct an investigatory stop with less than probable cause. Today, the police have within their electronic reach access to an extraordinary range of government databases. Moreover, every interaction with the police now raises the possibility that a more extensive personal profile will be established, regardless of whether any criminal conduct has occurred.

In recognition of the extraordinary consequences that may flow from police access to government databases, the Court should make clear that the failure to provide personal identification absent probable cause cannot provide the basis for an arrest. In the twenty-first century, significant Constitutional interests are implicated when the government compels the disclosure of personal identification.

Respectfully submitted,

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LARRY D. HIIBEL,

Petitioner,

v.

SIXTH JUDICIAL DISTRICT COURT OF NEVADA, HUMBOLDT COUNTY, *et al.*,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Nevada

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore limited constitutional government and secure those constitutional rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus curiae* briefs with the courts. Because the instant case raises vital questions about the power of government to stop individuals who do not wish to be stopped and to demand answers from individuals who do not wish to speak, the case is of central concern to Cato and the Center.

STATEMENT OF THE CASE[2]

On the evening of May 21, 2000, a bystander called the Humboldt County Sheriff's Office in Winnemucca, Nevada to report that the driver of a pick-up truck was

[1] The parties' consent to the filing of this *amicus* brief has been lodged with the Clerk of this Court. In accordance with rule 37.6, *amicus* states that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation of this brief.

[2] This statement of facts is based upon Patrol Deputy Lee Dove's trial testimony given February 13, 2001, in the Justices' Court of Union Township, Nevada.

hitting his female passenger. When Patrol Deputy Lee Dove responded, the reporting party directed him to a truck parked on the side of Grass Valley Road. Larry Hiibel was standing outside the truck. Deputy Dove asked Mr. Hiibel several times to identify himself, but Mr. Hiibel chose to remain silent. Because Mr. Hiibel refused to "cooperate" by identifying himself, Deputy Dove placed him in handcuffs and transported him to jail. Deputy Dove testified that because Mr. Hiibel had "potentially" committed a crime, he was legally required to identify himself pursuant to NRS § 171.123(3). Because Mr. Hiibel remained silent instead, he was charged with, and ultimately convicted of, delaying an officer under NRS § 199.280. Specifically, the trial court held that "Deputy Dove acted properly and lawfully when he asked [Mr. Hiibel] for identification and subsequently arrested him for refusing. . . ." Mr. Hiibel was never tried on any other charge.[3]

The Supreme Court of Nevada, in a 4-3 opinion, held that it is constitutional to arrest a person for exercising his right to remain silent by refusing to identify himself. *Hiibel v. Sixth Judicial District Court*, 59 P.3d 1201 (Nev. 2002). The three dissenting justices observed that "being forced to identify oneself to a police officer or else face arrest is government coercion – precisely the type of governmental intrusion that the Fourth Amendment was designed to prevent." *Id.* at 1209 (Agosti, J., with whom Shearing and Rose, JJ., join, dissenting).

[3] Nevada dismissed a domestic battery charge against Mr. Hiibel. *See Hiibel v. Sixth Judicial District Court*, 59 P.2d 1201, 1203, n.1 (Nev. 2002). No other charges were ever brought.

SUMMARY OF ARGUMENT

On first blush, the arrest of Larry Hiibel appears to be a petty matter, but this case actually raises profound questions regarding the power of government and the constitutional rights of the citizenry.

If citizens have the right to voluntarily engage in conversations with police officers (and they assuredly do), they must also retain the option of declining to engage in such conversations – especially when law enforcement agents are employing interrogation tactics that are purposely designed to have the citizen waive his right to reject a consensual stop or search or his right to silence.

If the government can criminalize citizen silence, citizens will no longer be able to rely upon their own wits when they find themselves confronted with law enforcement agents. There would simply be too much legal jeopardy: if self-incrimination, false statements, and simple silence can be jailable offenses, citizens will become totally dependent upon members of the legal profession to defend and vindicate their legal rights. And since attorneys are typically not on the scene as the events are unfolding, the rights of the citizenry will be trampled month to month, year to year – as only a few will seek out an attorney after-the-fact and file a lawsuit. This Court must recognize that such after-the-fact avenues of legal relief, at least in the context of citizen-cop street encounters, are woefully inadequate. This case provides the Court with an opportunity to declare a clear, simple and just rule of law: an American citizen cannot lose his liberty for simply declining to speak with a police officer. Any other rule will dilute the constitutional rights of all citizens, complicate the law, and spawn still more litigation.

ARGUMENT

I. IF GOVERNMENT AGENTS HAVE THE POWER TO ACTIVELY SEEK CONSENSUAL STOPS AND SEARCHES, THEN CITIZENS CANNOT BE ARRESTED FOR DECLINING SUCH INVITATIONS OR OTHERWISE ENGAGING IN PEACEFUL NONCOOPERATION.

History shows that from time to time government officials become so zealous in their desire to carry out their responsibilities that they not only come to *want* the full cooperation of citizen-suspects and citizen-witnesses, but they go so far as to *demand* it. And when such demands are resisted, there is a tendency for those in authority to overreact and to misperceive the entire affair as an instance of "obstruction of justice" or "interfering with a police officer" or "disorderly conduct." It is the duty of the judiciary to scrutinize such claims of "criminality" to determine whether the underlying conduct of the citizen truly interfered with a government agent in the performance of his duty – or whether the conduct merely displeased the agent.

When Geraldine Little stood on her Fourth Amendment rights and refused to allow a City Health official into her home without a warrant, she was arrested for "hindering" and "interfering" with an inspector in the performance of his duty. *District of Columbia v. Little*, 178 F.2d 13 (D.C. Cir. 1949), *aff'd* 339 U.S. 1 (1950). In reversing her conviction, the court noted that constitutional guarantees can be invoked not only against "malevolent and arrogant agents," but "wise and benign officials" as well. *Id.* at 17. The court also observed that it was immaterial whether the demand for entrance was "motivated by the highest public purpose or by the lowest personal spite." *Id.*

When Evelyn Miller stood on her Fourth Amendment rights and refused to allow a U.S. Marshal into her home without a search warrant, federal prosecutors charged her with "obstruction of justice." *Miller v. United States*, 230 F.2d 486 (5th Cir. 1956). In reversing her conviction, the court noted that Miller "asserted a right which was hers, and which none could take away. That it . . . subjected the officers to the inconvenience of getting a lawful writ, neither detracts from this right nor subjects her to a crime for having asserted it." *Id.* at 489-490.

When Albert Tinston refused to identify himself to plainclothes officers who accosted him on the street, he was arrested for "disorderly conduct." *People v. Tinston*, 163 N.Y.S.2d 554 (N.Y. Mag. Ct. 1957). In reversing his conviction, the court noted that Mr. Tinston "could hardly have employed a milder form of resistance to 'prevent an offense against his person.'" *Id.* at 559.

When Samuel King stood on his Fourth Amendment rights and told two deputy sheriffs to leave his property, he was arrested for "obstructing justice." *King v. State*, 149 So.2d 482 (Miss. 1963). In reversing his conviction, the court noted that since there was nothing in the record to justify the invasion of King's property, he was within his rights in treating the police officers as "trespassers." *Id.* at 483.

When Norman See stood on his Fourth Amendment rights and refused to allow city officials to search his warehouse without a warrant, he was prosecuted and fined. *See v. City of Seattle*, 387 U.S. 541 (1967). In reversing his conviction, this Court wrote that Mr. See could not "be prosecuted for exercising his constitutional right." *Id.* at 546.

When Delores Strange stood on her Fourth Amendment rights and refused to allow police officers to search the bedrooms of her home, she was arrested for "interfering" with the police. *Strange v. City of Tuscaloosa*, 652 So.2d 773 (Ala. Crim. App. 1994). In reversing her conviction, the court noted that the warrantless entry into the home violated her constitutional rights. Thus, "her actions to prohibit the entry and search cannot subject her to a criminal conviction for interfering with police officers." *Id.* at 776.

When Mary Ann and James Stumbo stood upon their Fourth Amendment rights and refused to allow a social worker into their home to interrogate their children, a court order (carrying criminal penalties) was issued. *In re Stumbo*, 582 S.E.2d 255 (N.C. 2003). That order instructed the Stumbos to not "obstruct" or "interfere" with the investigation. On appeal, the Supreme Court of North Carolina determined that it was the social worker's demands, not the conduct of the Stumbos, that were unlawful. *Id.*

Geraldine Little, Evelyn Miller, Albert Tinston, Samuel King, Norman See, Delores Strange, and Mary-Ann and James Stumbo could have acquiesced to the authorities with whom they were confronted, but instead they resisted by standing upon their constitutional rights. Initially, the government perceived the invocation of their rights as criminal behavior – it was only later that those rights were vindicated by the courts. In this case, Deputy Dove did his best to elicit a "voluntary" statement from Mr. Hiibel. For better or worse, that plan failed when Mr.

Hiibel exercised his right to remain silent and his "right not to cooperate." *United States v. Drayton*, 536 U.S. 194, 197 (2002).[4] By criminalizing citizen silence in these circumstances, Nevada has unconstitutionally burdened the right of citizens to withhold consent from agents who are aggressively seeking to secure citizen consent in order to justify stops and searches.[5]

II. IF GOVERNMENT AGENTS HAVE THE POWER TO ACTIVELY SEEK CONSENSUAL CONVERSATIONS WITH CITIZENS IN ORDER TO SECURE ADMISSIONS AND CONFESSIONS, THEN CITIZENS CANNOT BE ARRESTED FOR DECLINING SUCH INVITATIONS OR OTHERWISE ENGAGING IN PEACEFUL NONCOOPERATION.

In *Terry v. Ohio*, 392 U.S. 1 (1968), Justice White was undoubtedly correct when he observed that

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[4] In recent years police agencies have been employing a new tactic that has come to be called "Knock and Talk." *See, e.g., Scott v. Maryland*, 782 A.2d 862 (Md. 2001). The basic idea is to knock on the door of people's homes, engage them in conversation, and to try mightily to obtain consent for searches of those homes. This tactic is consistent with the constitutional rights of the citizenry – so long as this Court makes it plain that homeowners cannot face "obstruction of justice" charges for remaining silent or for peacefully closing their doors to uninvited government agents.

[5] Note that the claim that there is no "constitutional right to anonymity" only serves to obfuscate the issues at stake in this case. This claim is akin to arguing that the Constitution does not mention a "right to decline association with unwanted persons" (*but see Boy Scouts of America v. Dale*, 530 U.S. 640, 648-649 (2000) ("Government actions that may unconstitutionally burden [the freedom of association] may take many forms")) or a judicial hearing within forty-eight hours of an arrest (*but see County of Riverside v. McLaughlin*, 500 U.S. 44 (1991)).

> "There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way."

Id. at 34 (White, J., concurring). It is also undoubtedly true that the police can exploit any inculpatory utterance elicited from a citizen as a legal justification to augment his authority, such as by (a) detaining the citizen against his will; (b) frisking the citizen's clothes; or (c) conducting a full blown custodial arrest. *See, e.g., Grant v. State*, 461 A.2d 524 (Md. Ct. Spec. App. 1983). After all, if a police officer is walking the beat and asks a passerby if he has any "guns or drugs on his person,"[6] and the citizen replies "Well, I do have some cocaine right here in my coat," such an admission would furnish the police with a sufficient legal basis to search that coat and, if the cocaine is indeed found, to arrest that person. In other situations, the police may be able to secure admissions, such as a citizen's whereabouts at a critical time, and so forth. Under the law, then, the police can ask questions and citizens can certainly elect to answer those questions. This case raises the question as to whether a citizen can elect to resist entreaties by the police by remaining silent or otherwise engaging in peaceful noncooperation. *See Malloy v. Hogan*, 378 U.S. 1, 8 (1964) ("The Fourteenth Amendment secures against state invasion . . . the right of a person to remain silent unless he chooses to speak in the unfettered exercise

[6] Cf. *Ohio v. Robinette*, 519 U.S. 33 (1996) (police officer poses similar question to citizen).

of his own will, and to suffer no penalty . . . for such silence.")

History has shown that the government has attempted to establish precedents that will unconstitutionally burden the right of the citizen to choose silence in the face of questions posed by agents. For example, in *United States v. Di Re*, 332 U.S. 581, 594-95 (1948), prosecutors maintained that the police could infer probable cause of criminality from the fact that a citizen did not angrily protest his arrest and "did not at once assert his innocence." In *State v. Espinoza*, 641 N.W.2d 484 (Wis. Ct. App. 2002), prosecutors maintained that the police could prosecute a citizen for "obstruction of justice" because the citizen asserted his innocence and affirmatively denied his involvement in criminal activity. Overzealous prosecutors may believe that confessions are the only appropriate response to police questioning, but that is not the only prerogative under the American Constitution.[7]

Before this Court analyzes the constitutional issue in this case, it would be useful to begin with a restatement of certain propositions that are not in dispute. First, this Court has determined that the police can actively question citizens during "voluntary encounters" and "*Terry* stops." (*See Drayton; Terry v. Ohio*, 392 U.S. 1 (1968)). Second, the law also allows police officers to use various forms of trickery and deception to elicit statements from citizens who fall under suspicion. (*See, e.g., Illinois v. Perkins*, 496

[7] *See generally State v. Hamilton*, 356 N.W.2d 169 (Wis. 1984); *State v. Hauan*, 361 N.W.2d 336, 340-41 (Iowa Ct. App. 1984); *Enright v. Groves*, 560 P.2d 851 (Colo. Ct. App. 1977).

U.S. 292, 297-98 (1990); *State v. Barnes*, 572 S.E.2d 165 (N.C. Ct. App. 2002)). Third, an inculpatory statement or admission can be used against the person who makes it, and a false statement can lead to legal jeopardy, as well. (*See, e.g.*, 18 U.S.C.A. § 1001; Ga. Code Ann. § 16-10-20; Md. Code Ann., Crim. Law § 9-503). Fourth, *Miranda* warnings are not required during *Terry* stops. (*See, e.g., United States v. McGauley*, 786 F.2d 888, 890 (8th Cir. 1986)). Fifth, citizens have no constitutional right to know the identity of the government agents with whom they are confronted. (*Cf. Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971)).[8] Be that as it may, but now the State of Nevada has created legal jeopardy for citizens who simply elect to maintain silence. The constitutional problem here is very similar to the one that this Court noted in *Chavez v. Martinez*, 123 S. Ct. 1994, 2003-04 (2003), namely, "that if the privilege cannot be asserted in these situations, any statements [will] be deemed 'voluntary.'" Thus, the criminalization of the right to silence in these circumstances constitutes an unconstitutional burden upon the right against self-incrimination.[9]

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[8] When unidentified government agents act lawlessly, such as when a plainclothes officer conducts an illegal *Terry* stop, the citizen is obviously at a distinct disadvantage in obtaining any legal remedy. It is even worse when government agents misrepresent their identity. *See, e.g.*, Joel Berger, "The Police Misconduct We Never See," *New York Times*, February 9, 1999.

[9] Note also how the Nevada statute works in combination with the legal doctrine of search incident to arrest. The Nevada statute presents citizens with the Hobson's choice of "choos[ing] between forgoing their right to remain silent and forgoing their right not to be searched if they choose to remain silent." *Michigan v. DeFillippo*, 443 U.S. 31, 46 (1979) (Brennan, J., with whom Marshall and Stevens, JJ., join dissenting).

It should be noted that when a petitioner advanced an argument in this Court just a few years ago that persons who are under investigation might be unaware of their right to remain silent, this Court declared such a notion to be "implausible." *Brogan v. United States*, 522 U.S. 398, 405 (1998). In the circumstances of this case, the citizen was aware of his right to remain silent, but when he invoked it, the police placed him under arrest and took him to jail. Quite obviously, "the right to remain silent" is under a cloud, to say the least, in some jurisdictions.

III. IT IS PERVERSE TO REASON THAT THE CONSTITUTIONAL RIGHTS OF THE CITIZENRY MUST DISSIPATE ALONG WITH THE QUANTUM OF INCRIMINATING EVIDENCE IN THE POSSESSION OF THE GOVERNMENT.

The Nevada law under which Mr. Hiibel was prosecuted imposes a duty upon persons who are "stopped under reasonable suspicion by a police officer." When that legal duty is examined in the broader context of this Court's case law, it becomes apparent that its enforcement will only produce absurd results.

Consider that even if police detectives are able to convince a judicial officer to issue an arrest warrant because the police have done excellent investigative work and have probable cause to believe that a certain citizen has committed an offense, that citizen, upon his arrest, not only has the right to ignore questions posed by the arresting detectives and to remain silent, the police have an *affirmative obligation to warn the arrestee of his right to remain silent*. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Dickerson v. United States*, 530 U.S. 428 (2000).

Consider that even after the police and prosecutors are able to convince an impartial jury to convict a citizen of a criminal offense by presenting overwhelming evidence of guilt, that citizen-defendant *still* retains the right to remain silent during the sentencing phase of the criminal case. *See Mitchell v. United States*, 526 U.S. 314 (1999).

But now consider that in Nevada citizens are stripped of the right to remain silent when the government has a much lower quantum of incriminating evidence in its possession, that is, reasonable suspicion alone. Because of the limited coverage of the Nevada statute, citizens who do not fall under the reasonable suspicion of a police officer can still decline to identify themselves to police detectives without any threat of arrest and jail time. Are Nevada officials prepared to argue that that circumstance is simply a matter of legislative forbearance? Are Nevada officials prepared to argue that the legislature can revise the law so that the police can demand answers from any person who is *not under arrest*?[10] To paraphrase Judge Prettyman, To say that a citizen who is suspected of a crime has a right to remain silent, but that a citizen who is not suspected of a crime has no such right is a fantastic absurdity. *See District of Columbia v. Little*, 178 F.2d 13, 17 (D.C. Cir. 1949) (opinion of Prettyman).

The Supreme Court of West Virginia recently identified a related fallacy with respect to the First Amendment

[10] Nevada seems to suggest this in its brief to the Sixth Judicial Court below, contending that Mr. Hiibel's Fifth Amendment right "only applies once an individual is placed into custody." Respondent's Answering Brief in the Sixth Judicial District Court of the State of Nevada in and for the County of Humboldt, May 9, 2001, at 2.

issues that are lurking in the background of these criminalization-of-silence cases. When Brian Srnsky declined to identify himself to a police officer, he was arrested and prosecuted for "obstructing a law enforcement officer." In reversing his conviction, the court noted that if citizens have the right to peacefully remonstrate with an officer while he is performing his duty, "it stands to reason that silence *alone* cannot establish the [obstruction] offense." *State v. Srnsky*, 582 S.E.2d 859, 868 (W. Va. 2003) (emphasis in original).

IV. THE RIGHT TO REMAIN SILENT IS A SIMPLE, JUST, CONSTITUTIONAL RULE. ANY OTHER RULE WILL COMPLICATE THE LAW AND SPAWN MORE LITIGATION.

There are at least three additional problems with the legal claim that is being advanced by Nevada's prosecuting authorities. First, there is no indication in the record that Deputy Dove warned Mr. Hiibel that he was no longer *requesting* identification, but that he was *demanding* identification. This is a critical point because, under this Court's case law, Mr. Hiibel could have reasonably believed that he was involved in a "voluntary encounter" with a police officer and could therefore decline to answer questions or even walk away. *See Florida v. Bostick*, 501 U.S. 429, 437 (1991) ("[N]o seizure occurs when police ask questions of an individual, ask to examine the individual's identification, and request consent to search . . . so long as the officers do not convey a message that compliance with their requests is required.") Absent a formal warning, how was Mr. Hiibel to know precisely when his exchange with Deputy Dove ripened into a "*Terry* stop," thus triggering his legal duty under the Nevada statute to identify himself

to the police? In *Kolender v. Lawson*, 461 U.S. 352 (1983), this Court reaffirmed the proposition that penal statutes must define the criminal offense with sufficient definiteness that "ordinary people can understand what conduct is prohibited." *Id.* at 357. The Nevada statute does not meet that standard.

Second, if police officers can arrest people for standing on their right to silence, the line between a lawful, "black letter" *Terry* stop and an illegal detention will mean virtually nothing to one class of people: innocent people who have done absolutely nothing wrong.[11] If innocent persons can no longer avoid arrest by remaining peacefully silent, the only remaining options are to actively resist and risk both physical retaliation by police officers and "obstruction of justice" charges (*see, e.g., East Brunswick v. Malfitano*, 260 A.2d 862 (N.J. Super. Ct. App. Div. 1970)) or acquiesce on the scene and then seek out an attorney, after-the-fact, to pursue legal redress.[12] How many innocent people who find themselves illegally frisked and illegally detained for an hour or two will want to file a lawsuit?[13] Even if legal consultation is sought, how many

[11] Note that wrongdoers will typically be prosecuted and the judiciary will still invalidate illegal arrests, suppress statements, and so forth.

[12] *See State v. Hobson*, 577 N.W. 2d 825, 841 (Wis. 1998) (Abrahamson, C.J., concurring) (noting the inadequate nature of after-the-fact relief); *State v. Bradshaw*, 541 P.2d 800, 803-04 (Utah 1975) (Henriod, C.J., concurring) (damages are "no substitute for loss of freedom").

[13] In the late 1990s, New York City's Street Crimes Unit conducted scores of petty, but nonetheless illegal, arrests. *See* Lynch, "We Own the Night: Amadou Diallo's Deadly Encounter with New York City's Street Crimes Unit," Cato Institute Briefing Paper, No. 56 (March 31, 2000).

(Continued on following page)

attorneys would advise a client to proceed, given the case law? *See, e.g., Graves v. City of Coeur D'Alene*, 339 F.3d 828 (9th Cir. 2003) (detention and search were illegal, but agents held immune from suit); *Henes v. Morrissey*, 533 N.W.2d 802 (Wis. 1995) (arrest was illegal, but agents held immune from suit).

To keep the line between a lawful *Terry* stop and an illegal detention from evaporating for innocent and peaceful people who simply wish to stand on their rights under the law, this Court should not deprive the citizenry of a simple and traditional maneuver that they might invoke then and there, on-the-spot, as the critical events are unfolding – namely, maintaining their silence. Of course, there is no guarantee that every government agent will honor the limits of his authority in every situation, but if this Court makes it clear that citizen silence is something that the law honors, the number of abuses can certainly be minimized.

Third, sustaining the constitutionality of the Nevada statute at issue in this case will complicate the law and spawn still more litigation. Nevada requires citizens to identify themselves to police officers and other states have similar statutory provisions. Vermont, for example, provides that a person who "refuses to identify himself . . . satisfactorily to a police officer . . . shall forthwith be brought before a district court judge . . . " Vt. Stat. Ann. Tit. 24 § 1983. It is important to note, however, that numerous states have authorized their police agents to

See also "NYPD Hit on Stop and Frisk Report," *Daily News* (New York), December 1, 1999.

demand not just a person's name, but his address, destination, and/or an explanation of his actions as well. *See* Appendix (collecting representative statutes impacting the right to remain silent). Massachusetts, for example, provides that persons "who do not give a satisfactory account of themselves" may be arrested on the spot. Mass. Gen. Laws, ch. 41, § 98. Since it seems arbitrary to draw a constitutional distinction between a statute that compels a person to surrender his identity and a statute that compels a person to surrender both his name *and* address, destination, or explanation of his conduct, the lower courts are likely to split on questions concerning the constitutionally permissible amount of information police officers can properly compel from citizens during *Terry* stops.

Finally, this Court should note the cumulative effect that the patchwork of state, county, and local ordinances will have upon the right to remain silent. Justice Robert Jackson once remarked that "Any lawyer worth his salt will tell suspects in no uncertain terms to make no statement to police under any circumstances." *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in result in part and dissenting in part). If the Nevada statute (and others like it) are sustained, such advice will no longer be sound.

Indeed, this Court has been properly sympathetic to the predicament of police agents who are sometimes expected to apply uncertain legal rules in fast-moving street situations (*See Berkemer v. McCarty*, 468 U.S. 420, 431, n.13 (1984) ("Officers in the field frequently have neither the time nor the competence to determine the severity of the offense for which they are considering arresting a person.") (internal quotation marks and citations omitted), but this Court also has an obligation to

be sensitive to the plight of citizens who wish to stand upon their rights under the law in unexpected and sometimes heated circumstances.[14] *Coolidge v. New Hampshire*, 403 U.S. 443, 445 (1971) ("It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.") (quotation and citation omitted). A layperson can comprehend a ruling that secures a simple right to remain silent. But if that right is riddled with loopholes (e.g. you have the right to remain silent in this jurisdiction, but must give your name to the police in that one, and your name *and address* in yet another), citizens will become both docile and dependent upon members of the legal profession to protect their rights after-the-fact. And after-the-fact remedies will undermine the safeguards in the Fourth and Fifth Amendments, compromise individual liberty, complicate the law, and spawn still more litigation.

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[14] Cf. *Michigan v. DeFillippo*, 443 U.S. 31, 43, n.1 (1979) (Brennan, J., with whom Marshall and Stevens, JJ., join, dissenting) ("For if it is unfair to penalize a police officer for actions undertaken pursuant to a good-faith, though mistaken, interpretation of the Constitution, then surely it is unfair to penalize respondent for actions undertaken pursuant to a good-faith and *correct* interpretation of the Constitution.").

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Nevada should be reversed.

Respectfully submitted,

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APPENDIX

REPRESENTATIVE STATE, TERRITORIAL, AND LOCAL STATUTES IMPLICATING THE RIGHT TO REMAIN SILENT

Alabama

Ala. Code § 15-5-30 (providing that a police officer "may demand" a *Terry* suspect's "name, address and an explanation of his actions.")[1]

Arkansas

Ark. Code Ann. § 5-71-213 (providing that element of loitering is "refus[al] to identify [one]self and give a reasonably credible account of [one's] presence and purpose.")

California

Cal. Penal Code § 647(e) (providing that element of disorderly conduct is "refus[al] to identify [one]self . . . and to account for [one's] . . . presence when requested by any peace officer so to do. . . . ")[2]

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[1] The use of the word "demand" in this and similar statutes should not be taken lightly. As the police officers argued in *Henes v. Morrissey*, 533 N.W.2d 802, 807-08 (Wis. 1995), "the word 'demand' . . . presumes a consequence for refusing to produce identification upon their 'demand' for it during a lawful investigatory stop. The consequence . . . is arrest for obstruction under [the obstruction statute]." Although the Wisconsin court rejected this reasoning, Nevada and other states have not.

[2] Although this Court held the California statute unconstitutionally vague in *Kolender v. Lawson*, 461 U.S. 351 (1983), it has never been amended or repealed, and was recently cited in *People v. Ashton*, 2003 WL 22708680 (Cal. Ct. App. Nov 18, 2003).

Delaware

Del. Code Ann., tit. 11, § 1321(6) (providing that where loitering is suspected, police officer may "request[ ] identification and an explanation of the person's presence and conduct.")

Del. Code Ann., tit. 11, § 1902 (providing that a police officer "may demand" a *Terry* suspect's "name, address, business abroad and destination," and adding that "[a]ny person so questioned who fails to give identification or explain [his] actions to the satisfaction of the officer may be detained and further questioned and investigated" for up to two hours).

Florida

Fla. Stat. Ann. § 856.021 (providing that where loitering is suspected, police officer may request the person "to identify himself . . . and explain his . . . presence and conduct," and may take into consideration the person's "refus[al] to identify himself" in determining whether loitering has occurred.)

Fla. Stat. Ann. § 901.151(2) (providing that a police officer is entitled to ascertain a *Terry* suspect's "identity . . . and the circumstances surrounding [his] presence abroad. . . . ")

Georgia

Ga. Code Ann. § 16-11-36 (providing that where loitering is suspected, police officer may "request[ ] the person to identify himself and explain his presence and conduct," and may take into consideration the person's

"refus[al] to identify himself" in determining whether loitering has occurred).

Guam

8 Guam Code Ann. §§ 30.10, 30.20 (providing that a peace officer may detain a person "under circumstances which reasonably indicate that such person has committed, is committing or is about to commit a criminal offense" for the purpose of "ascertaining the identity of the person detained and the circumstances surrounding his presence abroad. . . . ," but adding that "such person shall not be compelled to answer any inquiry of the peace officer.")

9 Guam Code Ann. § 61.30 (providing that where loitering is suspected, police officer may request the person to "identify himself and explain his presence and conduct," and may take into consideration the person's "refus[al] to identify himself" in determining whether loitering has occurred).

Illinois

725 Ill. Comp. Stat. 5/107-14 (providing that a police officer "may demand" a *Terry* suspect's "name and address . . . and an explanation of his actions.")

Illinois: Chicago

Chicago, IL, Mun. Code § 2-84-310 (providing that a police officer "may stop any person in a public place whom the officer reasonably suspects is committing, has committed or is about to commit a criminal offense under the law of the State of Illinois or a violation of Chapter 8-20 of this

Code [re: weapons], and may demand the name and address of such person and an explanation of his actions.")

Kansas

Kan. Stat. Ann. § 22-2402(1) (providing that a police officer "may demand" a *Terry* suspect's "name, address . . . and an explanation of such suspect's actions.")

Louisiana

La. Code Crim. Proc. Ann. art. 215.1(A) (providing that a police officer "may demand" a *Terry* suspect's "name, address, and an explanation of his actions.")

Massachusetts

Mass. Gen. Laws, ch. 41, § 98 (providing that police officers "may examine all persons abroad whom they have reason to suspect of unlawful design, and may demand of them their business abroad and whither they are going," and adding that "[p]ersons so suspected who do not give a satisfactory account of themselves . . . may be arrested by the police. . . . ")

Minnesota: St. Paul

St. Paul, MN, Legis. Code § 225.11 (providing that a "peace officer may stop any person abroad in a public space whom he has reasonable grounds to believe is committing, has committed or is about to commit a felony or any crime or offense involving the use of a weapon of any kind, and may demand of him his name, address, and an explanation of his actions.")

Missouri: Kansas City

Mo. Ann. Stat. § 84.710 (Vernon's) (in a statute setting forth the powers to arrest of police officers in Kansas City, providing that those officers have the "power to . . . demand" a *Terry* suspect's "name, address, business abroad and whither he is going.")

Montana

Mont. Code Ann. § 46-5-401(2)(a) (providing that a police officer is entitled to "request" a *Terry* suspect's "name and present address and an explanation of the person's actions. . . . ")

Nebraska

Neb. Rev. Stat. § 29-829 (providing that a police officer "may demand" a *Terry* suspect's "name, address and an explanation of his actions.")

New Hampshire

N.H. Rev. Stat. Ann. § 594:2 (providing that a police officer "may demand" a *Terry* suspect's "name, address, business abroad and where he is going.")

N.H. Rev. Stat. Ann. § 644:6 (providing that where loitering is suspected, police officer may request the person to "identify himself and give an account for his presence and conduct," but adding that "[f]ailure to identify or account for oneself, absent other circumstances, however, shall not be grounds for arrest.")

New Mexico

N.M. Stat. Ann. § 30-22-3 (providing that it is a misdemeanor to "conceal[ ] one's true name or identity, or disguis[e] oneself with intent to obstruct the due execution of the law or with intent to intimidate, hinder, or interrupt any public officer . . . in a legal performance of his duty. . . . ")[3]

New York

N.Y. Crim. Proc. Law § 140.50(1) (McKinney's) (providing that a police officer "may demand" a *Terry* suspect's "name, address and an explanation of his conduct.")

North Dakota

N.D. Cent. Code § 29-29-21 (providing that a police officer "may demand" a *Terry* suspect's "name, address and an explanation of his actions.")

Rhode Island

R.I. Gen. Laws § 12-7-1 (providing that a police officer "may demand" a *Terry* suspect's "name, address, business abroad, and destination" and adding that "any person who fails to identify himself . . . and explain his . . . actions to the satisfaction of the peace officer may be further

[3] New Mexico has approved the use of this statute to convict a person who delays in providing his name to an investigating officer. *State v. Dawson*, 983 P.2d 421, 423 (N.M. Ct. App. 1999). The *Dawson* court held that Section 30-22-3 "requires a person to furnish identifying information immediately upon request . . . ," and rejected the defendant's Fourth Amendment arguments. *Id.* at 424.

detained and further questioned and investigated" for up to two hours.)

Utah

Utah Code Ann. § 77-7-15 (providing that a police officer "may demand" a *Terry* suspect's "name, address and an explanation of his actions.")

Vermont

Vt. Stat. Ann. tit. 24, § 1983 (providing that a law enforcement may detain a person if "(1) the officer has reasonable grounds to believe the person has violated a municipal ordinance; and (2) the person refuses to identify himself . . . satisfactorily to the officer when requested by the officer," and adding that: "If the officer is unable to obtain the identification information, the person shall forthwith be brought before a district court judge for that purpose. A person who refuses to identify himself . . . to the court on request shall immediately and without service of an order on the person be subject to civil contempt proceedings. . . . ")

Virgin Islands

14 V.I. Code Ann. § 1191(1) (providing for up to a $5,000 fine and 90 days imprisonment for one who "loiters, remains or wanders in or about a public place without apparent reason and under circumstances which reasonably justify suspicion that he may be engaged in or about to engage in crime, and, upon inquiring by a police officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes.")

Virginia: Arlington County

Arlington County (Va.) Code § 17-13 (providing that it "shall be unlawful for any person at a public place or place open to the public to refuse to identify himself by name and address at the request of a . . . police officer . . . , if the surrounding circumstances are such as to indicate to a reasonable man that the public safety requires such identification.")

Wisconsin

Wis. Stat. Ann. § 968.24 (providing that a police officer "may demand" a *Terry* suspect's "name, address and an explanation of [his] conduct.")

(9)

No. 03-5554

Supreme Court, U.S.
FILED
DEC 15 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, et al.,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Nevada

BRIEF AMICUS CURIAE OF JOHN GILMORE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

John Gilmore has done extensive legal and factual research on identity requirements. He respectfully submits this brief to bring to the Court's attention an error of law made by the Supreme Court of Nevada in its decision.

Like Mr. Hiibel, Mr. Gilmore was himself arrested in 1996 for "delaying or obstructing a peace officer in the performance of their duties." He was arrested in an airport, after refusing a police officer's demand for identification. The charge was never prosecuted, yet Mr. Gilmore was arrested, searched, transported, and detained for many hours. Like the "dedicated libertarian" mentioned in the Nevada Supreme Court dissent, Mr. Gilmore has deliberately chosen to have neither a driver's license nor a state-issued identification ("ID") card. If this Court decides that any police officer can demand identification based upon the slightest suspicion, Mr. Gilmore will continually be at risk of arrest, prosecution, and incarceration.

On July 4, 2002, Mr. Gilmore was not allowed to board commercial aircraft at two airports because he declined to show ID and declined to consent to a more intense suspicionless search based on his lack of ID. Mr. Gilmore is thus the plaintiff in Gilmore v. Ashcroft, et al., C02-03444, presently before Federal District Court Judge Susan Illston in the Northern District of California, where he

---

[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

seeks to uphold the long-standing constitutional rights to travel and to pursue a lawful existence without being required to carry "identity papers."

SUMMARY OF ARGUMENT

The Nevada Supreme Court has made an error of law. Contrary to statements made by that Court, no law or regulation requires travelers to show identification before traveling by air in the United States. To the extent that the constitutionality of Mr. Hiibel's arrest relies on the argument that "everyone is required to reveal government issued identification to airport officials", the decision below should be reversed.

ARGUMENT

I. Air Travelers are Not Required to Produce Identification

The Executive Branch has effectively convinced the public, apparently including all the judges of the Nevada Supreme Court, that travelers are required to show government-issued identification before flying. Signs in airports from the Transportation Security Administration state, "Passengers must present a BOARDING PASS and PHOTO IDENTIFICATION." Other signs headed "A Notice From the Federal Aviation Administration" include the sentence "PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN." The TSA's web

site states "Boarding Pass and Photo ID Required To Get to Your Gate."[2]

However, no such requirement has ever been enacted by Congress. Nor has any such requirement ever been published in the Federal Register by any Executive Branch agency. Neither FAA nor TSA has ever legally required travelers to have or present identification in order to travel. Although the government posts signs, and armed guards eject travelers who decline to show identification, federal agency officials freely admit that there is no such requirement.

FAA, DOT, and airline officials have repeatedly stated in writing that there is no federal requirement that passengers identify themselves. When these responsible officials are asked for the written rules, they disclaim the existence of a published law or regulation that requires identification. Their official position is that there is merely a "request", not a "requirement", that passengers provide their identification. Though the government admits to issuing secret orders making airlines "request" ID, and discouraging carriers from allowing unidentified passengers to fly, they also firmly state that there is no prohibition on flying without ID. Mr. Gilmore submits the attached documents as evidence for this statement.

As far back as April 1996, Cathal L. Flynn, Associate Administrator for Civil Aviation Security at the FAA, admitted in a letter sent to publisher Robert Ellis Smith:

[2] http://www.tsa.gov/public/interapp/editorial/editorial_1044.xml (as viewed on December 10, 2003)

> "The FAA issued a Security Directive to be put into effect at airports throughout the country . . . It is a countermeasure listed within this Security Directive that mandated that airlines request a valid form of identification from airline ticket holders. While an airline is required to request identification, the actual presentation of identification by the passenger is not absolutely required, and there is currently no prohibition against allowing someone on an aircraft without such identification.
>
> . . . Refusal to allow a passenger without a photo identification to board the aircraft . . . is the policy of an individual airline; this is not an FAA security requirement."

(Exhibit A)

In a May 1997 response to Samuel Weiler's FOIA request, the same Cathal L. Flynn again stated:

> " . . . the Federal Aviation Administration (FAA) has required airlines to request a valid form of identification from airline ticket holders. While an airline is required to request the identification, its actual presentation by the passenger is not mandatory, and there is currently no prohibition against allowing someone on an aircraft without such identification. The absence of identification, however, requires the airline to use alternative measures to provide the same level of security protection.
>
> The security directive (SD) in force at the time of your flight would be the governing legal document sent to the airlines relative to the question of ID checks. When necessary, a policy guidance letter may be sent by FAA in order to clarify the Government's intent or to address an airline's interpretation of security measures in an SD; measures such as ID checks. Neither of these documents are disseminated to the public, nor are they releasable."

(Exhibit B)

In June, 2001, James F. Parker, the General Counsel and incoming CEO of Southwest Airlines, wrote to Dr. Richard Weil:

> "Unfortunately, I am unable to discuss with you the FAA-mandated requirement that, under certain circumstances, Southwest Airlines and all other domestic air carriers request identification from their Customers. This inability does not stem from any unwillingness on the part of Southwest Airlines to challenge the FAA (as we have done on countless occasions over our 30 year history), but instead derives from an FAA-imposed mandate which effectively prevents Southwest Airlines from disclosing sensitive security information to the general public.
>
> . . . Therefore, we must respectfully decline to join you in opposing the requirement that Customers present identification."

(Exhibit C)

In December 2001, Secretary of Transportation Norman Y. Mineta wrote in a letter to Dr. Richard Weil:

> "Congresswoman Betty McCollum has asked me to respond to your letter concerning requirements to show photo identification before boarding an aircraft.
>
> [¶] . . .

> The FAA does require the air carriers to request valid forms of identification from their ticket holders. However, should a passenger not present acceptable identification because they do not have a photo identification card or refuse to show such identification, an air carrier must apply alternative measures of their choosing that provide the same level of security protection. Some of these alternative means are visible to the passenger and some are not. It is the carrier's right to deny boarding rights to any passenger it does not believe can be properly screened."

(Exhibit D)

On January 17, 2003, during oral arguments on the government's motion to dismiss Gilmore v. Ashcroft, et al., Mr. Joseph LoBue, Assistant U.S. Attorney, stated:

> "THERE IS NO RULE REQUIRING PRODUCTION OF ID'S FOR WHICH ONE CAN BE ARRESTED, THERE'S NOTHING LIKE THAT. PLAINTIFF WASN'T ARRESTED, HE WAS ASKED FOR AN IDENTIFICATION CARD, THAT'S IT. WHEN HE DIDN'T PRODUCE IT HE LEFT. HE WASN'T DETAINED, HE WASN'T SEIZED; HE WAS ASKED FOR IDENTIFICATION."

(Exhibit E, page 31)

When Judge Illston attempted to elicit from the government exactly what law she was to evaluate for constitutionality, Mr. LoBue alleged that he cannot disclose the specific rule about ID, since it is in a secret security directive:

> THE COURT: WHAT IS THE RULE, IF AT ALL, CONCERNING IDENTIFICATION?

> MR. LOBUE: THE IDENTIFICATION CHECK, EVERY PASSENGER IS REQUESTED TO PRODUCE IDENTIFICATION. AS I'VE INDICATED, THE STATUTE PROVIDES ONE OF THE PURPOSES TO CHECK WHETHER THAT PERSON IS AMONGST THOSE KNOWN TO POSE A RISK TO AVIATION SAFETY.
>
> THE OTHER REASON IT'S USED FOR PURPOSES OF THE PRESCREENING SYSTEM, IS THIS A PERSON –
>
> THE COURT: I UNDERSTAND IT, YOU SAID ALL OF THAT. YOU WERE SAYING THE RULE IS NOT VOID FOR VAGUENESS AND WE CAN MOVE ON. I JUST WANT TO KNOW WHAT THE RULE IS THAT ISN'T VOID.
>
> MR. LOBUE: IF YOU'RE ASKING ME TO DISCLOSE WHAT'S IN THE SECURITY DIRECTIVES, I CAN'T DO IT.
>
> THE COURT: I WANT TO KNOW WHAT WE'RE TALKING ABOUT IN THIS CASE. THIS MAN WAS TOLD, "GIVE ME YOUR ID"?
>
> MR. LOBUE: ACCORDING TO THE COMPLAINT THE GOVERNMENT MANDATED AIRPLANES TO REQUEST IDENTIFICATION FROM EACH AND EVERY PASSENGER, THAT'S WHAT HAPPENED.
>
> THE COURT: I NEED TO KNOW WHAT CITE I'M TALKING ABOUT WHEN I TRY TO MAKE A DECISION WHETHER THIS COMPLAINT STATES A CLAIM. SO CAN I FOCUS ON THAT, THAT THE GOVERNMENT REQUIRED THE AIRLINE TO –
>
> MR. LOBUE: I THINK YOU HAVE TO ASSUME THAT THE ALLEGATIONS IN THE

COMPLAINT ARE, IN FACT, TRUE FOR PURPOSES OF OUR MOTION, YES. THAT THE GOVERNMENT REQUIRED THE AIRLINES TO REQUEST IDENTIFICATION FROM THE PASSENGERS.

THAT WHEN THEY REFUSE TO PROVIDE IT, THAT SOUTHWEST AIRLINES REFUSED PASSAGE, AND UNITED AIRLINES INDICATED THAT THE PLAINTIFF WOULD BE ALLOWED TO FLY IF HE SUBMITTED TO A FURTHER SEARCH.

WE WERE PREPARED TO ASSUME ALL OF THAT IS TRUE FOR PURPOSES OF THE COMPLAINT, THEY ACTED AT THE INITIATIVE OF THE GOVERNMENT. AT THE BEHEST OF THE GOVERNMENT.

THE COURT: THANK YOU.

(Exhibit E, pages 31-32)

Despite the government's frequent attempts to confuse the public, these statements demonstrate that no published law or regulation requires air travelers to present identification. Instead, the requirement is a classic case of secret law. Mr. Gilmore respectfully suggests that the lack of published law and the secrecy surrounding the airport ID requirement exist *because* federal officials recognize that such a written requirement would be subject to a strong constitutional challenge.

II. The Absence of an Air ID Requirement Supports Reversal

The Nevada Supreme Court's decision partially rests on the premise that, because all passengers must show ID to board an aircraft, Mr. Hiibel's arrest and conviction for

failure to show ID are constitutional, because Mr. Hiibel's search was less intrusive by comparison. However, since no legislature authorized these airport-ID practices, nor has any court yet ruled on their constitutionality, the essence of the argument is that actions taken by fiat by the Executive Branch in airports can change an unconstitutional roadside search into a constitutional one. This argument should be rejected.

Nevada and its Supreme Court argue that the existence of an ID requirement for travelers would support the state's demand for ID in *Terry* stops. We have just shown that such an ID requirement for travelers does not exist. Following their reasoning, the *absence* of any actual law justifying ID requirement for travelers *undermines* Nevada's argument that ID can be demanded during *Terry* stops. With one exception, the *only* situation the Nevada Supreme Court could find in which citizens are required to show an ID has now been shown to be a figment – a public relations maneuver unsupported by any legal authority. The sole exception is the safety requirement that operators of motor vehicles, a potentially dangerous machine, show a driver's license. The rest of the situations they cite, such as names on business cards, are voluntary transactions hardly comparable to a compelled *Terry* stop.

Nevada Supreme Court Justice Young's majority opinion states:

> "The requirements of NRS 171.123(3) are also reasonable and involve a minimal invasion of personal privacy.[28] Reasonable people do not expect their identities – their names – to be withheld from officers. Rather, we reveal our names in a variety of situations every day without much consideration. For instance, it is merely polite manners to introduce ourselves

> when meeting a new acquaintance. A person's name is given out on business cards, credit cards, checks, and driver's licenses, to name a few more instances. In addition, *everyone is required to reveal government issued identification to airport officials* and are subject to random searches before proceeding to flight gates. Asking a suspect to state his or her name when an officer has an articulable suspicion *is nominal in comparison.*"

59 P.3d 1201, 1206 (2002) [emphasis added].

The dissenting opinion of Nevada Supreme Court Justice J. Agosti, with JJ. Shearing and Rose, states:

> "The majority avoids the fact that knowing a suspect's identity does not alleviate any threat of immediate danger by arguing that a reasonable person cannot expect to withhold his identity from police officers, as we reveal our names to different people everyday. What the majority fails to recognize, however, is that when we give our names to new acquaintances, business associates and shop owners, we do so voluntarily, out of friendship or to complete a transaction. *With the heightened security at airports, for example, passengers are required to provide picture identification.* But non-passengers are free to wander that portion of the airport that is unsecured without showing an ID. *Purchasing an airline ticket is a business transaction, and the airlines may condition the sale on knowing who the purchaser is. In contrast, being forced to identify oneself to a police officer or else face arrest is government coercion – precisely the type of governmental intrusion that the Fourth Amendment was designed to prevent.* Furthermore, it is not necessary to have one's name on a credit card or checkbook in order to effect a purchase. A dedicated libertarian, for example, might deliberately eschew financial institutions, credit cards and checkbooks, engaging solely in cash transactions, in order to jealously protect his individual rights, especially his right to be anonymous, to be left alone, to wander freely."

59 P.3d 1201, 1209 (2002) [emphasis added].[3]

Respondent's petition opposing certiorari to the U.S. Supreme Court, page 7, states:

> " . . . In order to function in our society it is necessary that a person provide their name under a variety of governmental imposed requirements. A person can not obtain a job without first providing identification to their potential employer. This is required because the employer needs to complete paperwork required by the state and federal government as it relates to wage withholding and benefits. Lending institutions governed by governmental rules and regulations require a person to provide identification before a loan can be approved. *Individuals can not attend schools, travel the airlines or obtain a credit card without revealing their identification.* In addition, individuals who are stopped for traffic violations provide identification to the officer. These

[3] There are two errors in this passage. The first is that passengers are required to show ID. The second is that airlines freely make a business decision to require identification of passengers, independent of government coercion. The government admits that its own secret directives *require* airlines to "request" identification from every traveler, or *require* them to apply some unspecified "alternative security measures" if the passenger does not comply.

> are just some examples that illustrate how pervasive the requirement to provide identification has become in our society."

[emphasis added]

The Nevada Supreme Court and Respondent are in error. Individuals are free to travel by air without revealing their identification. The lack of such a requirement undercuts the argument that individuals standing by a roadside can be reasonably required to show identification or be arrested.

CONCLUSION

The Nevada Supreme Court supported its decision with a faulty premise. It assumed that the pervasiveness of ID demands in airports meant that the practice must be lawful and constitutional. Instead, the absence of any law or regulation requiring air travelers to show identification suggests that the practice is neither lawful nor constitutional. Unpublished airport identification practices, operating as secret law, cannot support the constitutionality of the Nevada law that requires identification during *Terry* stops.

Respectfully submitted,

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LAW OFFICE OF JAMES P. HARRISON
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Sacramento, CA 95814
(916) 492-9778

EXHIBIT A

Associate Administrator
for Civil Aviation Security

[LOGO]
U.S. Department
of Transportation
Federal Aviation
Administration

800 Independence Ave., SW.
Washington, DC 20591

APR 19 1996

Mr. Robert Ellis Smith
Publisher, Privacy Journal
P.O. Box 28577
Providence, RI 02908

Dear Mr. Smith:

Thank you for your April 1 letter concerning the requirement to request a valid form of identification from commercial airline ticket holders. Since your concerns are identical to those in your previous two letters on this topic, I will reiterate the Federal Aviation Administration (FAA) position.

The FAA issued a Security Directive to be put into effect at airports throughout the country in response to recent intelligence indicating an elevated domestic threat situation. It is a countermeasure listed within this Security Directive that mandated that airlines request a valid form of identification from airline ticket holders. While an airline is required to request identification, the actual presentation of identification by the passenger is not absolutely required, and there is currently no prohibition against allowing someone on an aircraft without such identification. However, the absence of identification may

result in the use of alternative measures that provide the same level of security protection.

Security countermeasures issued by the FAA in a Security Directive establish security minimums for adoption by airlines and airports. Airlines and airports may exceed those minimum standards by implementing more stringent security requirements. Where airlines implement additional or more stringent measures, passengers may sometimes experience differences in procedures as they undergo processing. Refusal to allow a passenger without a photo identification to board the aircraft is an example of such differences, and is the policy of an individual airline; this is not an FAA security requirement.

As always, the highest priority of the FAA is the safety and security of the traveling public. Your concerns are duly noted.

Sincerely,

/s/ Cathal L. Flynn
Cathal L. Flynn
Associate Administrator for
Civil Aviation Security

EXHIBIT B

Associate Administrator
for Civil Aviation Security

[LOGO]
U.S. Department
of Transportation
**Federal Aviation
Administration**

800 Independence Ave., SW.
Washington, DC 20591

MAY 20, 1997

Mr. Samuel R. Weiler
4902 Forbes Avenue
Pittsburgh, PA 15213

Dear Mr. Weiler:

This is in response to your October 23, 1996, letter, which has been remanded to the Office of the Associate Administrator for Civil Aviation Security for reconsideration. We apologize for the delay in responding to your request. On August 5, 1996, you requested a broad range of documents related to the requirement that airlines request a valid form of identification from commercial airline ticket holders. On January 10, Mr. Kellerman called you to clarify the scope of your request. During this conversation you reiterated the substance of your correspondence.

On July 10, 1989, the *Federal Register* published an amendment to Title 14 of the Code of Federal Regulations, Part 108 (14 CFR Part 108), that provided for the issuance of security directives and information circulars as a means of disseminating information concerning threats against civil aviation. This amendment was designated 14 CFR Part 108.18.

In response to intelligence indicating a threat of terrorism, the Federal Aviation Administration (FAA) has required airlines to request a valid form of identification from airline ticket holders. While an airline is required to request the identification, its actual presentation by the passenger is not mandatory, and there is currently no prohibition against allowing someone on an aircraft without such identification. The absence of identification, however, requires the airline to use alternative measures to provide the same level of security protection.

The security directive (SD) in force at the time of your flight would be the governing legal document sent to the airlines relative to the question of ID checks. When necessary, a policy guidance letter may be sent by FAA in order to clarify the Government's intent or to address an airline's interpretation of security measures in an SD; measures such as ID checks. Neither of these documents are disseminated to the public, nor are they releasable.

Referring to your last letter: 1) There are no relevant segregable portions of any security document FAA has sent to an airline that would not compromise security. 2) All documents covered by your original request were addressed in the September 24, 1996, denial in terms of FAA's legal response. 3) Documents produced by FAA have not, as asserted, been widely released.

These documents fall within Exemption 3 of the FOIA (5 U.S.C. 552(b)(3)), which permits the withholding of records specifically exempted from disclosure by another statute. The applicable statute in this instance is 49 U.S.C. Section 40119(b), which states, in part, that the Administrator may prescribe regulations he considers necessary to prohibit disclosure of any information obtained or developed

in the conduct of security or research and development activities if he concludes that disclosure would be detrimental to the safety of persons traveling in air transportation.

The safety regulation issued under 49 U.S.C. Section 40119(b) can be found in 14 CFR 191.7(b) which exempts from disclosure security directives, information circulars, and any comments, instructions, or implementing guidance pertaining thereto. Accordingly, it has been determined that the disclosure of this SD or other documents related to this issue would be detrimental to the safety of persons traveling in air transportation. Therefore, your request for release of documents is denied.

The undersigned is responsible for this denial. You may request reconsideration of this determination by writing to:

Associate Administrator for Administration
FAA Headquarters
800 Independence Avenue, SW.
Washington, DC 20591

Your request for reconsideration must be made in writing within thirty (30) calendar days from the date of receipt of this letter and must include all information and arguments relied upon. Your letter must state that it is an appeal of the above-described denial of a request made under the FOIA. The envelope containing the appeal must be marked "FOIA."

Sincerely,

/s/ Cathal L. Flynn
Cathal L. Flynn
Associate Administrator for
Civil Aviation Security

EXHIBIT C

[LOGO]

SOUTHWEST AIRLINES CO.

James F. Parker
Vice President
General Counsel

P.O. Box 36611
Dallas, Texas 75235-1611
214-792-4138
214-792-6660 (Facsimile)

June 14, 2001

Dr. Richard H. Weil
2057 Fairmount Avenue
St. Paul, MN 55105

Dear Dr. Weil:

I am in receipt of your letter dated May 21, 2001, addressed to Herb Kelleher, Chief Executive Officer, Southwest Airlines Co. Even though I will not be assuming Herb's title as Chief Executive Officer until June 19, 2001, he has asked me to respond to you just to see if I'm ready!

First and foremost, I want to thank you for your complimentary remarks about Southwest Airlines. The mission of Southwest Airlines includes dedication to the highest quality of Customer Service delivered with a sense of warmth, friendliness, individual pride, and spirit, and I am hopeful and confident that we can deliver on this mission.

Unfortunately, I am unable to discuss with you the FAA-mandated requirement that, under certain circumstances, Southwest Airlines and all other domestic air carriers request identification from their Customers. This

inability does not stem from any unwillingness on the part of Southwest Airlines to challenge the FAA (as we have done on countless occasions over our 30 year history), but instead derives from an FAA-imposed mandate which effectively prevents Southwest Airlines from disclosing sensitive security information to the general public.

Although I have not provided you with the response that you were seeking, I am afraid it is the only response possible under the circumstances. Therefore, we must respectfully decline to join you in opposing the requirement that Customers present identification. Thanks in advance for your understanding.

Sincerely

/s/ Jim Parker
James F. Parker

cc: Mr. Herbert D. Kelleher

EXHIBIT D

[LOGO] **THE SECRETARY OF TRANSPORTATION**
WASHINGTON, D.C. 20590

December 27, 2001

Dr. Richard Weil
2057 Fairmount Avenue
St. Paul, MN 55105

Dear Dr. Weil:

Congresswoman Betty McCollum has asked me to respond to your letter concerning requirements to show photo identification before boarding an aircraft.

Title 49, United States Code (U.S.C.), requires air carriers to screen all passengers and property to be carried on board commercial passenger aircraft and to refuse transportation to persons who refuse such screening. Part 108 of Title 14 of the Code of Federal Regulations (14 CFR) states that airlines must have a security program that provides for the safety of persons and property traveling in air transportation. The Federal Aviation Administration (FAA) approves that air carrier standard security program. Airlines may implement additional or more stringent security measures that can result in differences in procedures. The security programs are protected from disclosure by another Federal statute (5 U.S.C. Section 552(b)(3)).

The FAA does require the air carriers to request valid forms of identification from their ticket holders. However, should a passenger not present acceptable identification because they do not have a photo identification card or refuse to show such identification, an air carrier must apply alternative measures of their choosing that provide

the same level of security protection. Some of these alternative means are visible to the passenger and some are not. It is the carrier's right to deny boarding rights to any passenger it does not believe can be properly screened.

Inspection of identification media is just one means the airlines use to fulfill security requirements, because photo identification cards, as you point out, can be illegally falsified. Although it may slow down some ticket and check-in lines, asking for identification does provide some deterrence value. Checking the identification card necessitates the air carrier employee and the passenger make eye contact and does require the air carrier employee to match the face with the identification. Anything that adds additional deterrence and enhances security is valuable, especially in light of the September 11 events.

The requirement that a passenger's middle initial be on every ticket is not an FAA requirement; it is an airline requirement. Perhaps the air carriers can provide an explanation of this requirement.

The requirements for photo identification are not tied to the FAA's computer-assisted passenger prescreening system (CAPPS). CAPPS selection criteria are based on parameters developed within the counterterrorism community and reviewed by the Department of Justice to ensure nondiscriminatory methods of passenger selection. In addition, the FAA has no plans to fingerprint every traveler.

In response to the horrific events of September 11, not only do we believe it is imprudent to withdraw the requirement for identification checks at this time, we are requiring even more security measures for U.S. airports and air carriers and for foreign air carriers with flights to

the United States. Despite the inconvenience of these measures, the public understands and, in most cases, seems to welcome the extra security measures. We continue to enhance security requirements for airports and air carriers across the country and are proud of the unprecedented level of cooperation attained among the Federal Government, the public, airport operators, and air carriers to implement those procedures quickly and effectively.

I appreciate your interest in aviation security.

Sincerely yours,

/s/ Norman Y. Mineta
Norman Y. Mineta

cc: Congresswoman Betty McCollum

EXHIBIT E

Hearing Transcript from January 17, 2003:

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

JOHN GILMORE, PLAINTIFF, VS. JOHN ASHCROFT, ET AL. DEFENDANT.	NO. C 02-3444 SI PAGES 1 - 40

SAN FRANCISCO, CALIFORNIA
FRIDAY, JANUARY 17, 2003

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUSAN ILLSTON

UNITED STATES DISTRICT JUDGE

APPEARANCES:

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[3] FRIDAY, JANUARY 17, 2003 9:00 A.M.

(PROCEEDINGS HELD IN OPEN COURT:)

THE CLERK: CIVIL 02-3444, JOHN GILMORE VERSUS ASHCROFT.

MR. SIMPICH: GOOD MORNING, YOUR HONOR.

WILLIAM SIMPICH AND JAMES HARRISON APPEARING FOR THE PLAINTIFF.

THE COURT: GOOD MORNING.

MR. LOBUE: JOSEPH W. LOBUE, DEPARTMENT OF JUSTICE, FOR THE FEDERAL GOVERNMENT.

MS. BARRETT: GOOD MORNING, YOUR HONOR.

JANE BARRETT FOR SOUTHWEST AIRLINES.

MS. CARROLL: GOOD MORNING, YOUR HONOR.

KATHRYN CARROLL FOR UNITED AIRLINES.

THE COURT: GOOD MORNING.

FIRST, WITH RESPECT TO UNITED AIRLINES, DO THE REMAINING PARTIES AGREE THAT UNITED CAN BE SEVERED FROM THIS LITIGATION?

MR. SIMPICH: DUE TO THE BANKRUPTCY STATUS, I ASSUME?

THE COURT: YEAH.

MR. SIMPICH: IF IT HASN'T CHANGED, I AGREE, YOUR HONOR, YES.

MR. LOBUE: GOVERNMENT HAS NO OBJECTION.

MS. BARRETT: SOUTHWEST HAS NO OBJECTION.

* * *

[31] THERE IS NO RULE REQUIRING PRODUCTION OF ID'S FOR WHICH ONE CAN BE ARRESTED, THERE'S NOTHING LIKE THAT. PLAINTIFF WASN'T ARRESTED, HE WAS ASKED FOR AN IDENTIFICATION CARD, THAT'S IT.

WHEN HE DIDN'T PRODUCE IT HE LEFT. HE WASN'T DETAINED, HE WASN'T SEIZED, HE WAS ASKED FOR IDENTIFICATION.

THE COURT: COULD YOU JUST SAY THAT ONCE AGAIN, THE RULE IS, DON'T CARRY BOMBS AND GUNS ONTO AIRPLANES?

MR. LOBUE: DON'T ATTEMPT TO HIJACK AIRPLANES.

THE COURT: THAT'S THE RULE?

MR. LOBUE: THAT'S THE RULE.

THE COURT: WHAT IS THE RULE, IF AT ALL, CONCERNING IDENTIFICATION?

MR. LOBUE: THE IDENTIFICATION CHECK, EVERY PASSENGER IS REQUESTED TO PRODUCE IDENTIFICATION. AS I'VE INDICATED, THE STATUTE PROVIDES ONE OF THE PURPOSES TO CHECK

WHETHER THAT PERSON IS AMONGST THOSE KNOWN TO POSE A RISK TO AVIATION SAFETY.

THE OTHER REASON IT'S USED FOR PURPOSES OF THE PRESCREENING SYSTEM, IS THIS A PERSON –

THE COURT: I UNDERSTAND IT, YOU SAID ALL OF THAT. YOU WERE SAYING THE RULE IS NOT VOID FOR VAGUENESS AND WE CAN MOVE ON. I JUST WANT TO KNOW WHAT THE RULE IS THAT ISN'T VOID.

MR. LOBUE: IF YOU'RE ASKING ME TO DISCLOSE WHAT'S IN THE SECURITY DIRECTIVES, I CAN'T DO IT.

[32] THE COURT: I WANT TO KNOW WHAT WE'RE TALKING ABOUT IN THIS CASE. THIS MAN WAS TOLD, "GIVE ME YOUR ID?"

MR. LOBUE: ACCORDING TO THE COMPLAINT THE GOVERNMENT MANDATED AIRPLANES TO REQUEST IDENTIFICATION FROM EACH AND EVERY PASSENGER, THAT'S WHAT HAPPENED.

THE COURT: I NEED TO KNOW WHAT CITE I'M TALKING ABOUT WHEN I TRY TO MAKE A DECISION WHETHER THIS COMPLAINT STATES A CLAIM. SO CAN I FOCUS ON THAT, THAT THE GOVERNMENT REQUIRED THE AIRLINE TO –

MR. LOBUE: I THINK YOU HAVE TO ASSUME THAT THE ALLEGATIONS IN THE COMPLAINT ARE, IN FACT, TRUE FOR PURPOSES OF OUR MOTION, YES. THAT THE GOVERNMENT REQUIRED

THE AIRLINES TO REQUEST IDENTIFICATION FROM THE PASSENGERS.

THAT WHEN THEY REFUSE TO PROVIDE IT, THAT SOUTHWEST AIRLINES REFUSED PASSAGE, AND UNITED AIRLINES INDICATED THAT THE PLAINTIFF WOULD BE ALLOWED TO FLY IF HE SUBMITTED TO A FURTHER SEARCH.

WE WERE PREPARED TO ASSUME ALL OF THAT IS TRUE FOR PURPOSES OF THE COMPLAINT, THEY ACTED AT THE INITIATIVE OF THE GOVERNMENT. AT THE BEHEST OF THE GOVERNMENT.

THE COURT: THANK YOU.

MR. LOBUE: ON THE RIGHT TO TRAVEL ISSUE, TURNING TO THAT, IT'S NOT AN ABSOLUTE RIGHT, IT'S A RIGHT NOT TO BE – TO BE UNINHIBITED BY RULES WHICH UNREASONABLY BURDEN OR RESTRICT THE RIGHT TO FREE MOVEMENT.

[33] YOU'RE NOT ENTITLED TO BE COMPLETELY FREE FROM GOVERNMENT REGULATION BECAUSE YOU'RE IN TRAVEL STATUS. THE NINTH CIRCUIT IN MILLER VERSUS REED MAKE CLEAR THAT THERE IS NO RIGHT TO THE MOST CONVENIENT FORM OF TRAVEL. NOBODY HAS A

* * *

[40] MARTINELLI, CAREY, ON THAT LINE.

IN REGARDS TO THE RIGHT TO TRAVEL ISSUE WHICH COUNSEL ARGUES THEY SHOULD NOT BE LIABLE FOR, AGAIN, THIS GOES RIGHT BACK TO THE SECRET LAW ISSUE, AS TO WHETHER OR NOT THEY HAVE THE RIGHT TO DEMAND ID OR NOT. WE

DO NOT KNOW WHAT THAT LAW IS BECAUSE IT'S NOT BEEN PUBLISHED. THE GOVERNMENT HAS STATED, AS WE MENTIONED IN OUR ADDENDUM THAT THE AIRLINES ARE NOT MANDATED TO DEMAND, MERELY REQUEST IT.

THE COURT: ALL RIGHT. THANK YOU.

(COURT ADJOURNED:)

CERTIFICATE OF REPORTER

I, JAMES YEOMANS, OFFICIAL REPORTER FOR THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, 450 GOLDEN GATE AVENUE, SAN FRANCISCO, CALIFORNIA 94102, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 1 THROUGH 40, INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING

BY COMPUTER TO THE BEST OF MY ABILITY.

/s/ James Yeomans FEBRUARY 17, 2003

JAMES YEOMANS, RPR, CSR

(10)

No. 03-5554

Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, AND THE HONORABLE RICHARD A. WAGNER, DISTRICT JUDGE

Respondents.

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BRIEF OF NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, NATIONAL COALITION FOR THE HOMELESS, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, NATIONAL ALLIANCE TO END HOMELESSNESS, NATIONAL HEALTH CARE FOR THE HOMELESS COUNCIL, AND NATIONAL COALITION FOR HOMELESS VETERANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici will address the following question:

Whether laws that require individuals to identify themselves during *Terry* stops violate the Fourth Amendment particularly in light of the unreasonable burdens such provisions inflict upon homeless individuals.

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INTERESTS OF *AMICI CURIAE*

The National Law Center on Homelessness & Poverty ("NLCHP") is a not-for-profit organization based in Washington, D.C., established to address issues related to

homelessness and poverty at the national level.[1] Poor and homeless people are frequently without effective political voice or power. NLCHP works with groups throughout the country to ensure that the constitutional and statutory rights of homeless families and individuals are protected and that laws are not selectively enforced against them.

NLCHP monitors and advocates nationally against local laws that "criminalize" homelessness by making it a crime to perform life-sustaining activities in public areas. To date, NLCHP has published seven national reports on this topic, including surveys of the enactment and enforcement of such laws in over 50 major U.S. cities. NLCHP has challenged the selective enforcement of laws prohibiting the obstruction of sidewalks, jaywalking and sleeping in public spaces. Further, NLCHP has investigated state procedures that make it virtually impossible for homeless people to acquire valid identification. For example, NLCHP has surveyed the photo identification requirements in every state and has interviewed over 100 homeless service providers about the barriers that homeless people face when obtaining such identification. NLCHP has extensive experience with federal constitutional questions affecting homeless people and believes the insights derived from its experience will assist the Court.

The National Coalition for the Homeless ("NCH") is a non-profit organization and membership network of state and local homeless coalitions committed to the goal of ending homelessness through the creation of systemic and attitudinal change. NCH uses grassroots organizing, public education,

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of this Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

policy advocacy, technical assistance, and partnerships as tools to end homelessness. Concurrently, NCH works to support the civil rights of persons who are either homeless or are at risk of becoming homeless. As one component of its work in the area of civil rights, NCH helped establish the National Homeless Civil Rights Organizing Project (NHCROP), which has nine field sites in different regions of the country. In addition, NHCROP has published several reports on civil rights abuses, including two reports entitled *"Illegal to be Homeless: The Criminalization of Homelessness in the U.S."* in 2002 and 2003.

The Judge David L. Bazelon Center for Mental Health Law ("Bazelon") is a national public interest organization founded in 1972 to advocate for the rights of children and adults with mental disabilities. Bazelon has written model laws, advocated for protective legislation, and participated either as counsel or *amicus curiae* in virtually all civil cases concerning mental disability law that have come before this Court, most recently in *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581 (1999), as well as in cases such as *Riggins* v. *Nevada*, 504 U.S. 127 (1992), and *Washington* v. *Harper*, 494 U.S. 210 (1990). Since 2000, Bazelon has focused increasing resources on people with mental illnesses in the criminal justice system.

The National Alliance to End Homelessness ("NAEH") is a non-profit membership organization working with the public, private and non-profit sectors to solve the problem of homelessness. NAEH's mission is to address the long-term solutions to homelessness. NAEH accomplishes this by working to direct national policy on homelessness and to increase the capacity of local organizations to deliver effective assistance. NAEH actively supports efforts to protect the constitutional rights of homeless people.

The National Health Care for the Homeless Council ("National Council") is a membership organization comprised of organizational members and hundreds of individuals who

are organized as the HCH Clinician's Network. The mission of the National Council is to help bring about reform of the health care system to best serve the needs of people who are homeless, to work in alliance with others whose broader purpose is to eliminate homelessness, and to provide support to National Council members. The National Council works closely with other service providers and advocates toward the elimination of homelessness. The National Council organizes an annual Policy Symposium that examines the impact of current and proposed public policies on homeless people, and contributes to various conferences, meetings and studies regarding health and homelessness each year. Members of the National Council serve over 350,000 homeless clients per year, and the National Council supports the protection of the constitutional rights of homeless persons.

The National Coalition for Homeless Veterans ("NCHV") is a public interest organization founded in 1990 by a group of community-based homeless veteran service providers. NCHV seeks to eliminate homelessness in the veteran community by inviting individuals and service providers to collaborate in the development of innovative, comprehensive services that will allow homeless veterans to support themselves. NCHV serves as a liaison between branches of the federal government and community-based homeless veteran service providers. NCHV aims to end homelessness among veterans by shaping public policy, educating the public, and building the capacity of service providers. NCHV shares the goal of protecting the civil rights of homeless people.

STATEMENT OF FACTS

Under Nevada Revised Statute section 171.123, an officer may detain an individual based on "circumstances which reasonably indicate" the commission of a crime. Nev. Rev. Stat. 171.123(1). While an individual is so detained, Nevada allows the officer to demand the individual identify himself.

Id. 171.123(3) ("The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself ...").

Petitioner Larry Hiibel was stopped by a Humboldt County, Nevada police officer, who was investigating a battery complaint. See *Hiibel* v. *Sixth Judicial District Court ex rel. County of Humboldt*, 59 P.3d. 1201, 1203 (Nev. 2002). Acting upon a reasonable suspicion of criminal activity, the officer demanded that Mr. Hiibel identify himself on eleven separate occasions. *Id.* Mr. Hiibel refused to provide identification upon these requests. *Id.* Eventually the officer arrested him for delaying a police officer pursuant to Nev. Rev. Stat. 199.280 based on his failure to identify himself. *Id.* Mr. Hiibel was convicted of obstructing and delaying the police officer based on his failure to identify himself. *Id.* He was not tried on any other charge.

Squarely at issue then is the right of an individual to be free from mandatory identification requirements when detained by police officers pursuant to a *Terry* stop. The perspective of homeless people on such requirements is particularly relevant given that they must conduct much of their everyday living in public places and thus are less able to avoid contact with the police. Virtually every major U.S. city has criminalized the public performance of activities that many homeless people must perform in public, such as sleeping, sitting and eating. As a result, homeless people are often stopped by the police for such everyday activities. In addition, many states impose permanent address requirements that make it virtually impossible for homeless people to obtain identification documents. Allowing the law at issue here to stand would thus have particularly harsh consequences for homeless people. Already more likely to be stopped by police, homeless people would face not only greater privacy intrusions, but also a requirement that their situation makes extremely difficult for them to meet.

Homeless People Must Constantly Be In Public.

It is an obvious yet critical truth that homeless people are out in public more often than the general population, and consequently are uniquely and constantly exposed to the significant police power to regulate behavior in public places. Indeed, the McKinney-Vento Act[2] defines homeless people as "individual[s] who lack[] a fixed, regular, and adequate nighttime residence" and whose "primary nighttime residence ... is ... a supervised publicly or privately operated shelter designed to provide temporary living accommodations" or "a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings." 42 U.S.C. § 11302(a).

The number of people affected by this problem is not insignificant. While it is difficult to measure the total number of homeless people in this country, most estimates place the number of homeless people on any given day at between 500,000 and 750,000, and the number of homeless people throughout the year at anywhere between 1.5 million and 3.75 million. Ann Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 Hous. L. Rev. 211, 268 (2003); Martha Burt et al., *Helping America's Homeless: Emergency Shelter or Affordable Housing?* 49-50 (2001).

The causes of homelessness are complex, but the vast majority of homeless people is living in public involuntarily. Indeed, the most apparent reason why homeless individuals are forced to live in public is the lack of affordable housing,

[2] The McKinney-Vento Homelessness Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987), is a comprehensive attempt to address the social service and legal needs of homeless individuals, including the needs for shelter, food, health care, housing and education. *See* 42 U.S.C. §§ 11301-11489.

although several other factors frequently contribute to the circumstances that force people into homelessness.[3]

America's cities face a growing gap in the availability of temporary shelter – a situation that forces homeless people to live involuntarily in public space. On any given night there are at least as many people sleeping on the street as there are sleeping in shelters. See James D. Wright & Joel A. Devine, *Housing Dynamics of the Homeless: Implications for a Count*, 65 Am. J. of Orthopsychiatry 320, 323 (1995). A survey of 50 of the largest cities in the United States found that not one had enough shelter spaces for the number of homeless people in that city on any given day.[4] This crisis is desperate and getting worse; the 2002 report of the U.S. Conference of Mayors based on a 25-city survey estimated that requests for emergency shelter had increased by 19 percent since 2001, with 88 percent of cities reporting an increase. U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities, 2002: A 25-City Survey* ii (Dec. 2002). Any doubts as to the involuntary nature of homelessness are dispelled by the fact that, of the number of homeless people requesting emergency shelter in

[3] NLCHP, *Out of Sight – Out of Mind* i (Jan. 1999) ("*Out of Sight – Out of Mind*"); Nat'l Coalition for the Homeless, *Illegal to be Homeless: The Criminalization of Homelessness in the United States* 11 (Aug. 2003) ("*Illegal to be Homeless*") (discussing decrease in affordable housing for low-income individuals). Other causes cited for homelessness, in order of frequency, include mental illness, substance abuse, low paying jobs, domestic violence, unemployment, poverty, prison release, downturn in the economy, limited life skills, and changes and cuts in public assistance programs. U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities, 2002: A 25-City Survey* ii (Dec. 2002).

[4] *Illegal to be Homeless* at 13; *Out of Sight – Out of Mind* at 1-2. In Atlanta, there are 15,000 to 22,000 people homeless on any given night, and a maximum of 2700 beds. In Los Angeles, there are 42,000 to 77,000 people homeless on any given night and a maximum of 8300 beds. *See* Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 Yale L. & Pol'y Rev. 1, 13 (1996).

the surveyed cities, 30 percent of homeless people and 38 percent of homeless families were turned away. *Id.*[5]

Many shelters, moreover, require residents to leave during the day and do not allow residents to store their belongings at the shelter.[6] Thus, many homeless people, even if able to secure shelter at night, are left with nowhere to go during the day except public places, and are forced to carry all their personal possessions with them. In 32 percent of cities, families may have to spend their daytime hours outside the shelter used at night. *Id.* at iii.

Without permanent places of residence, homeless people must regularly perform acts in public that would otherwise be done in private – behaviors that may, in and of themselves, justify a *Terry* stop. These behaviors include walking the streets at all hours of the day and night, occupying public spaces for extended periods of time, carrying large amounts of personal property, sleeping in public, and erecting and living in makeshift shelters.

Studies Of *Terry* And Homeless People.

The perspective of homeless people regarding *Terry* stops is particularly relevant because of the unique relationship of *Terry* stops and homeless people. Several factors approved by various courts for use in deciding whether a *Terry* stop is

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[5] Families experiencing homelessness account for 41 percent of the homeless population and are especially hard hit by this lack of housing. U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities, 2002: A 25-City Survey* iii (Dec. 2002). This figure is up from 37 percent in 1999. U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities, 1999: A 26-City Survey* 2 (Dec. 1999).

[6] Office of Policy Dev. & Research, U.S. Dep't of Hous. & Urban Dev., *A Report to the Secretary on the Homeless and Emergency Shelters* 38 (1988). In addition, some shelters charge fees, usually between $3 and $10, a price that can be prohibitively expensive for those seeking accommodations. *See* Foscarinis, *supra* note 4, at 13.

appropriate make it likely that a homeless person could be justifiably stopped. These factors include: hour of the day, unusual presence, high crime area, unusual dress, unusual actions, smell, sounds, information from witnesses, personal knowledge of a suspect, and statements by a suspect.[7] Such factors, however, may indicate not only a crime but also the reality of homelessness. For example, unusual dress, unusual presence, or public presence at an odd hour of the day are all unfortunate effects of a lack of housing.

In 1999, the Office of the Attorney General in New York City began an investigation into the New York City Police Department's use of the *Terry* stop and frisk. Civil Rights Bureau, Office of the Attorney Gen. of the State of N.Y., *The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General* (Dec. 1, 1999) ("NYC Investigation"). The results of this analysis capture the impact of *Terry* stops on homeless individuals – merely because of the circumstances of their living situation, homeless people are more likely to be subject to police officers' use of the *Terry* stop and frisk. The first phase of the investigation sought to document and describe stop and frisk practices citywide. As a part of the NYC Investigation, the first of its kind, the Office of the Attorney General reviewed approximately 175,000 "stop & frisk" UF-250 police forms. Of these 175,000 stops, in 17,853 cases (just over 10%) the suspected charge was a "Misdemeanor/Quality of Life" violation. *Id.* at tbl.I.A.5. Additionally, of the 58 behaviors most commonly cited as justifications for the *Terry* stop, many were either directly or indirectly linked to the effects of homelessness. These factors include: Suspicious Behavior

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[7] Steven L. Argiriou, *Terry Stop Update: The Law, Field Examples and Analysis*, The Quarterly Review Archive 6-8, *available at* Dep't of Homeland Sec., Federal Law Enforcement Training Center website, http://www.fletc.gov/legal/archives.pdf (last modified Aug. 5, 2003).

(Nervousness, Pacing), Suspicious Clothing, Location (Out of Place), Panhandling, Loitering, Suspected Trespassing, Trespass Affidavit Program/Clean Halls Program, Disorderly Conduct, and Loitering on Subway Platform for Extended Period. *Id.* at tbl.II.A.1.

Considerable evidence also exists that some law enforcement officials use *Terry* stops to arrest and generally harass homeless people even absent reasonable suspicion of the occurrence of a "quality of life" crime. See, *e.g.*, *Justin* v. *City of L.A.*, No. CV0012352LGBAIJX, 2000 WL 1808426, at *8 (C.D. Cal. Dec. 5, 2000). In *Justin*, homeless individuals sought injunctive relief against the City of Los Angeles and others to prevent "'a widespread campaign of harassment and intimidation directed at' the homeless ... population." *Id.* at *1. The harassment consisted of, among other behaviors, "stopping homeless individuals and demanding identification without a reasonable basis upon which to suspect that a crime had been committed." *Id.* The court granted a permanent injunction based in part on declarations from the targeted homeless people attesting to random stops, demands for identification, and threats of arrest to compel compliance with identification requests. *Id.* at *13.

Governmental Efforts To Criminalize Homelessness.

The effects of investigative stops upon homeless individuals are all the more profound because "at least thirty-nine American cities have initiated or continued policies that criminalize activities associated with homelessness." Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 Colum. J.L. & Soc. Probs. 293, 293 (1996). These "quality of life" laws, defined as laws addressing behaviors that cannot be classified as serious crimes, "spread an exceedingly wide net." Mary I. Coombs, *The Constricted Meaning of "Community" in Community Policing*, 72 St. John's L. Rev. 1367, 1369 (1998). For instance, homeless individuals resting on the sidewalk could often be at least investigated for

obstructing the sidewalk.[8] These laws also make it illegal to engage in activities such as sleeping, sitting, standing, leaning, cooking or storing personal belongings – behaviors that would be lawful if conducted in a private home. Examples of these types of anti-homelessness ordinances prevent sleeping in public places,[9] camping[10] or lodging in

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[8] It is estimated that 90 percent of cities in the United States have ordinances banning the obstruction of sidewalks. *See Illegal to be Homeless* 68-71 (Aug. 2003); NLCHP, *Punishing Poverty: The Criminalization of Homelessness, Litigation, and Recommendations for Solutions* v (May 2003).

[9] Dallas, Tex., City Code § 31-13(a)(1) (it is a crime to "sleep[] or doze[] in a street, alley, park, or other public place"); Beverly Hills, Cal., City Code art. 13, § 5.6.1303, *amended by* Beverly Hills, Cal., City Ordinance 93-0-2165 (1993) (prohibits sitting, lying, or sleeping in any public places, with exceptions for physical disability, legally conducted parades, and those who are "seated on a bench lawfully installed for such purpose"); Phoenix, Ariz., City Code § 23-48.01 ("[i]t shall be unlawful for any person to use a public street ... sidewalk [or] other right-of-way, for lying, sleeping or otherwise remaining in a sitting position thereon, except in the case of a physical emergency or the administration of medical assistance"); Miami, Fla., Code § 37-3 ("[i]t shall be unlawful for any person to sleep on any of the streets, sidewalks, public places or upon the private property of another without the consent of the owner thereof"); Cal. Penal Code § 647(j) (prohibiting "lodg[ing] in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to [its] possession or ... control").

[10] Santa Ana, Cal., City Code § 10-402, *amended by* Santa Ana, Cal., Ordinance NS-2160 (Apr. 3, 1992), makes it "unlawful for any person to camp, occupy camp facilities, or use camp paraphernalia in ... (a) any street; (b) any public parking lot or public area, improved or unimproved." The statute defines "camp facilities" and "camp paraphernalia" to include "temporary shelters," "tarpaulins, cots, beds, sleeping bags, hammocks or non-city designated cooking facilities and similar equipment." *Id.* § 10-401(b), (c). The statute also makes it unlawful to "store personal property" in any public area. *Id.* § 10-403. Under Section 43.52 of the City Code for the City of Orlando, Florida, "camping," defined to include "sleeping out-of-doors," is prohibited.

any public area,[11] or public bathing.[12] Similarly, some cities have targeted homeless people either by eliminating public spaces utilized by homeless people or by attempting to prevent homeless people from using facilities that are generally available to the public.[13]

The most egregious cases of efforts against homeless people leave no doubt as to the motivation behind such laws. For example, the City of Santa Ana, California developed what the California Supreme Court described as a "four-year effort ... to expel homeless persons" and "to show 'vagrants' that they were not welcome." *Tobe* v. *City of Santa Ana*, 892 P.2d 1145, 1151 (Cal. 1995). As a part of what the trial court described as Santa Ana's "war on the homeless," police conducted sweeps in which homeless persons "were handcuffed and taken to an athletic field where they were booked, chained to benches, marked with numbers, and held for up to six hours, after which they were released at a different location." *Id.* Some of the conduct leading to the arrests "involved nothing more than dropping a match, leaf, or piece of paper, or jaywalking." *Id.*

Other documented anti-homeless campaigns include San Francisco's directive that police officers vigorously enforce eighteen "quality of life" crimes, an effort also known as the

[11] Cal. Penal Code § 647(j) prohibits "lodg[ing] in any [public] building, structure, vehicle, or place ... without the permission of the owner or person entitled to [its] possession or ... control." N.Y. Admin. Code § 16-122(b) bars erecting "any shed, building or other obstruction."

[12] San Antonio, Tex., City Code § 22-88 prohibits bathing in any body of water in any public area of the city.

[13] In Montgomery County, Texas, for example, a commissioner's court approved a measure to put combination locks on the county building restrooms to prevent homeless people from using the facilities. Carla Rivera, *California Is 'Meanest' State for Homeless*, L.A. Times. Aug. 6, 2003, at B.8; *Illegal to be Homeless* at 49. According to a county judge, the combination would be given to anyone unless "'they walk in with a suitcase.'" *Id.*

"Matrix" program. *Joyce* v. *City & County of San Francisco*, 846 F. Supp. 843, 846 (N.D. Cal. 1994).[14] Many of these violations were transparently focused on homeless people, including prohibitions against "trespassing, . . . urinating or defecating in public, removal and possession of shopping carts, solicitation on or near a highway, erection of tents or structures in parks, obstruction and aggressive panhandling." *Id.* These efforts apparently led to over 3,000 citations issued to homeless people. *Id.* at 848.

Other similar efforts, short of outright prohibitions, have included systematic imposition of focused restrictions on the time and location of various homeless "activities."[15] Examples of such ordinances include limiting the time one can remain on a beach,[16] stand near an ATM,[17] or lie down in a public place.[18] Though many loitering statutes have been

[14] On appeal, the Ninth Circuit found that the *Joyce* case was moot because, under the new mayoral administration, the city eliminated the official Matrix policy and dismissed many citations and warrants issued under the program. *Joyce* v. *City & County of San Francisco*, 87 F.3d 1320 (9th Cir. 1996) (table), *available at* 1996 WL 329317.

[15] Foscarinis, *supra* note 4, at 1.

[16] *See, e.g.*, Santa Monica, Cal., Mun. Code § 4.08.090, *amended by* Santa Monica, Cal., Ordinance 1738 (Apr. 26, 1994).

[17] *See* NLCHP, *No Homeless People Allowed* 33 (1994) (documenting a San Francisco ordinance which prohibited loitering within 30 feet of an ATM machine); *Clark* v. *City of Cincinnati*, No. 1-95-448, slip op. at 14 (S.D. Ohio May 22, 1995) (enjoining the city from enforcing an ordinance that criminalized soliciting funds within certain distances of some buildings, ATM machines, and crosswalks, and in all areas after 8 p.m.).

[18] Seattle, Wash., Municipal Code § 15.48.040 prohibits lying or sitting on sidewalks in downtown and neighborhood commercial areas from 7 a.m. to 9 p.m. *See Berkeley Cmty. Health Project* v. *City of Berkeley*, 902 F. Supp. 1084, 1086 (N.D. Cal. 1995) (preliminary injunction issued forbidding enforcement of ordinance that prohibited sitting or lying down on a sidewalk within six feet of the face of a building during certain hours and soliciting in certain locations or in a "coerc[ive], threaten[ing],

voided by courts as unconstitutionally vague,[19] more narrowly-drawn statutes have been upheld and remain in effect.[20]

Many States Make It Very Difficult Or Impossible For Homeless People To Obtain Identification Documents.

The process of acquiring formal identification documents can pose insurmountable obstacles for homeless persons. Many states require proof of residence as a prerequisite to obtaining identification cards.[21] Homeless persons, lacking not merely proof of residence but residence itself, are therefore unable to acquire state-issued identification. Twenty-seven states have also recently enacted rule changes or laws that increase the documentation requirements for proof of residency and other prerequisites for driver's licenses and identification cards.[22] In addition, obtaining formal

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hound[ing] or intimidat[ing]" manner), *vacated upon settlement*, 966 F. Supp. 941 (N.D. Cal. 1997).

[19] *See City of Chicago* v. *Morales*, 527 U.S. 41 (1999) (loitering ordinance void for vagueness); *United States ex rel. Newsome* v. *Malcolm*, 492 F.2d 1166, 1171-74 (2d Cir. 1974), *aff'd on other grounds sub nom. Lefkowitz* v. *Newsome*, 420 U.S. 283 (1975).

[20] *See* Paul Ades, *The Unconstitutionality of "Antihomeless" Law: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 Cal. L. Rev. 595, 604 (1989); *United States* v. *Cassiagnol*, 420 F.2d 868, 872-77 (4th Cir. 1970) (upholding regulation barring loitering on government property).

[21] *See, e.g.*, 67 Pa. Code § 91.4 (In order to obtain an identification card, an applicant must present proof of address, as well as supporting papers confirming identity); Va. Code Ann. § 46.2-323(B) (In order to acquire a Virginia driver's license, an applicant must "provid[e] satisfactory proof that he is a resident of the Commonwealth.").

[22] *See* Rich Stanek, *Essay: Terrorism: Minnesota Responds to the Clear and Present Danger*, 29 Wm. Mitchell L. Rev. 739, 744 (2003).

identification often requires payment of a fee, which poses special obstacles for those living in poverty.[23]

States frequently impose further burdens by having strict and circular documentation requirements that are difficult for homeless people to meet. For example, some states require a birth certificate to obtain photo identification, but require photo identification in order to obtain a birth certificate.[24] Such requirements often leave homeless people caught in the catch-22 of needing identification to acquire identification.[25]

SUMMARY OF ARGUMENT

The Fourth Amendment generally prohibits searches and seizures without probable cause. U.S. Const. amend. IV. At the heart of the Fourth Amendment lies "'the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.'" *Winston* v. *Lee*, 470 U.S. 753, 758 (1985) (quoting *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

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[23] *See, e.g.*, Or. Rev. Stat. § 807.410; *see also* Oregon Driver Licensing Fees, *available at* http://www.odot.state.or.us/dmv/DriverLicensing/drfees.htm (last modified Oct. 14, 2003).

[24] *See, e.g.*, Va. Code Ann. § 46.2-345 (In order to receive a state identification card, the applicant must present a birth certificate or other acceptable evidence of his name and date of birth). Some states will accept only original or certified copies of documents. *See, e.g.*, Okla. Admin. Code § 595:10-1-3(b).

[25] Lacking any place to store possessions, homeless people also often face loss or destruction of their belongings, including their identification. *See Pottinger* v. *City of Miami*, 810 F. Supp. 1551, 1555-56 (S.D. Fla. 1992) (documenting incidents of malicious destruction of the property of homeless persons including "two burning incidents in Lummus Park in which City police officers awakened and handcuffed class members, dumped their personal possessions – including personal identification, medicine, clothing and a Bible – into a pile, and set the pile ablaze.").

Under certain circumstances, exceptions to this right have been created in light of legitimate needs of law enforcement, although even these exceptions have been circumscribed by the resulting intrusion upon individual liberty. In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court recognized one such exception by allowing a police officer to conduct preliminary questioning and a search for weapons when the officer has a reasonable, articulable suspicion of criminal activity. This Court has extended that *Terry* exception to other circumstances, but it has never before questioned the right of individuals to be free not to answer the questions posed – and not to identify themselves – during pre-custodial investigation.

The right to refuse to identify oneself has been a bedrock guarantee embodied in both the Fourth and Fifth Amendments. In *Brown* v. *Texas*, 443 U.S. 47 (1979) – a case not involving reasonable suspicion – this Court expressly noted that "appellant may not be punished for refusing to identify himself." *Id.* at 53; *see also Davis* v. *Mississippi*, 394 U.S. 721, 727, n.6 (1969) ("[W]hile police have the right to request citizens to answer voluntary questions concerning unsolved crimes they have no right to compel them to answer."). Chief Justice Rehnquist recently confirmed the vitality of this rule, when he observed for the Court "the individual's right to go about his business or to stay put and remain silent in the face of police questioning," at least in the absence of reasonable suspicion. *Illinois* v. *Wardlow*, 528 U.S. 119, 125 (2000). In the Fifth Amendment context, *Miranda* and its progeny likewise instruct that this right applies in the context of custodial investigation. *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *United States* v. *Mandujano*, 425 U.S. 564, 579-81 (1976).

This Court's inquiry into the reasonableness of searches and seizures has always been properly informed by the realities faced by citizens and law enforcement personnel. Flight at the sight of the police, for instance, is treated

differently than calm retreat. Compare *Wardlow*, 528 U.S. at 125, and *Florida* v. *Royer*, 460 U.S. 491 (1983). While *Terry* itself involved fears of an armed robber, however, the ordinances used to justify *Terry* stops of homeless individuals often involve mere nuisances.

Homeless individuals are, in practice, particularly vulnerable to *Terry* stops given their unavoidable presence in public spaces. As previously noted, numerous cities across the nation have indeed criminalized conduct in which only homeless individuals routinely engage. See *supra* 10-14. Several communities have overtly directed their law enforcement to target homeless people for enforcement of "quality of life" crimes in efforts to expel homeless people. See *id.* The net result of the efforts to criminalize the activities of homeless people is to transform them into "walking reasonable articulable suspicions," rendering the "right to be let alone" an empty promise for homeless people.

Moreover, approval by this Court of a formal identity document requirement would be particularly unreasonable as applied to homeless persons because many states have requirements for obtaining identification that homeless persons cannot meet. See *supra* at 14-15. Requiring a formal means of identification to be produced by a person when such identification is practically impossible to obtain can hardly be "reasonable" within the meaning of the Fourth Amendment. Application of the rule at issue here to homeless persons, however, would have just that result.

The Nevada law at issue is also unreasonable under the Fourth Amendment in that it is vague on the central issue of the requirement to "identify himself." Is mere utterance of a name adequate? Or is the production of a state-issued identity-document required? The Nevada statute is thus infected with the same infirmity this Court identified in *Kolender* v. *Lawson*, 461 U.S. 352, 360-61 (1983).

Unless the right to refuse to identify oneself is a bright-line liberty that applies not only to *Brown* stops without reasonable suspicion and *Miranda* custodial interrogation, but also to *Terry* stops based on reasonable suspicion, it will mean very little indeed. A completely innocent average citizen – much less a poor, innocent homeless person – has no way of ascertaining whether an officer is making a request for identification to be supplied voluntarily. A constitutional principle that relies upon pervasive understanding of the nuances of the Fourth Amendment is in effect a dead letter. Such a rule would in practice eviscerate "the individual's right to go about his business or to stay put and remain silent in the face of police questioning." *Wardlow*, 528 U.S. at 125. Only a clear, bright-line freedom to remain silent when asked to identify oneself will protect the constitutional principles of the Fourth Amendment.

The perspective of homeless people on this issue is especially relevant because the justice of a rule of law should be measured by its impact upon those least able to defend themselves in the political process. Because homeless people are constantly exposed to police surveillance and because securing identification is often impossible for them, it is particularly unreasonable to allow police to demand identification from them during a *Terry* stop. Accordingly, this Court should be mindful of homeless people in assessing the proper limitations on the *Terry* exception to the Fourth Amendment.

ARGUMENT

THE FOURTH AMENDMENT PROHIBITS STATUTES THAT IMPOSE BLANKET REQUIREMENTS TO PROVIDE IDENTIFICATION DURING *TERRY* STOPS.

Nevada's identification statute exceeds the "narrowly drawn authority" recognized in *Terry* v. *Ohio*, 392 U.S. 1, 27

(1968), as an exception to the Fourth Amendment. Given the standards of *Terry* and the multitude of "quality of life" crimes cities have enacted, homeless persons have been transformed into "walking reasonable articulable suspicions." Especially in light of the pervasive use of *Terry* encounters upon homeless persons, identification statutes must be sufficiently curtailed to preserve an effective constitutional right to refuse to identify oneself to the police.

A. The Right To Refuse To Identify Oneself Is A Well-Established Liberty.

This case presents a narrow window of uncertainty within well-established liberties that restrict police investigative conduct in the face of personal privacy. The right to refuse to respond to any questions by the police is well-recognized at both ends of this spectrum: the right is clear both (1) where police lack any reasonable articulable suspicion of a criminal violation, see *Brown* v. *Texas*, 443 U.S. 47, 52-53 (1979), and (2) where police are conducting a custodial interrogation, see *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

The Court first recognized a Fourth Amendment right to refuse to provide police with identification in the absence of any reasonable articulable suspicion in *Brown* v. *Texas*, 443 U.S. 47 (1979). The appellant in *Brown* was convicted under a Texas statute that made it an offense to "'intentionally refuse[] to report or give[] a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.'" *Id.* at 49 n.1. After observing that the arresting officers "lacked any reasonable suspicion to believe appellant was engaged or had engaged in criminal conduct," the Court reversed the conviction, making clear that "appellant may not be punished for refusing to identify himself." *Id.* at 53.

Since *Brown*, the Court has repeatedly reaffirmed this liberty to "ignore the police" based on "the individual's right to go about his business or to stay put and remain silent in the

face of police questioning" when reasonable suspicion is absent. *Illinois* v. *Wardlow*, 528 U.S. 119, 125 (2000); see also *Florida* v. *Royer*, 460 U.S. 491 (1983). The Court in *Brown*, however, expressly left open the issue of whether a person could be forced to identify himself during a *Terry* stop. See *Brown*, 443 U.S. at 53 n.3.

Similarly, under the aegis of the Fifth Amendment, the Court has repeatedly recognized the individual's fundamental right to remain silent once police have initiated a custodial investigation. See, *e.g.*, *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *United States* v. *Mandujano*, 425 U.S. 564, 580-81 (1976) ("Under *Miranda*, a person in police custody has, of course, an absolute right to decline to answer any question, incriminating or innocuous"); see also *Doyle* v. *Ohio*, 426 U.S. 610, 617-18 (1976) (noting that *Miranda* assures that post-arrest silence will carry no criminal penalty).

Thus, the Court previously has recognized in the clearest of terms the right to refuse to identify oneself in both the "pre-*Terry*" (*i.e.*, before a reasonable, articulable suspicion has arisen) and "post-*Terry*" (*i.e.*, after probable cause has been obtained) scenarios. It is against this backdrop that the Court must confront the yet unaddressed question of such a right in the context of a *Terry* encounter.

B. The *Terry* Exception Should Not Be Expanded To Require Individuals To Identify Themselves.

The Fourth Amendment's requirement of probable cause serves as a bulwark of personal liberty. See *Winston* v. *Lee*, 470 U.S. 753, 759 (1985). In *Terry*, the Court addressed the inescapable tension between this liberty and the competing need for law enforcement to employ "an escalating set of flexible responses" in dealing with dangerous situations on city streets. *Terry*, 392 U.S. at 10. In doing so, the Court struck a delicate balance, limiting both the circumstances in which such a seizure could be performed as well as the scope and nature of the procedure. *Id.* at 20.

First, the Court held that a stop-and-frisk comports with the Fourth Amendment only in situations when the police officer has a reasonable and articulable suspicion that criminal activity may be afoot *and* where the officer "has reason to believe that he is dealing with an armed and dangerous individual." *Id.* at 27. This "reasonable articulable suspicion" requirement serves as an important protection against arbitrary government searches that inflict "a serious intrusion upon the sanctity of the person." *Id.* at 16-17. Accordingly, the Court afforded only a "narrowly drawn authority" to intrude upon this sanctity, permitting it only where there are "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21; see also *Ybarra* v. *Illinois*, 444 U.S. 85, 93 (1979) ("The *Terry* case created an exception to the requirement of probable cause, an exception whose narrow scope this Court has been careful to maintain") (internal quotation marks omitted).

Although *Terry* placed significant emphasis upon the need for police officers to protect themselves from objectively suspicious individuals who may be dangerous, subsequent cases have upheld these encounters in less threatening situations, such as possessory drug offenses[26] and immigration violations.[27] Despite this expansion, *Terry*'s progeny have not abandoned the balance struck in *Terry* itself between "the neutralization of danger to the policeman in the

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[26] *See, e.g.*, *Alabama* v. *White*, 496 U.S. 325 (1990); *United States* v. *Sokolow*, 490 U.S. 1 (1989); *United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985); *United States* v. *Place*, 462 U.S. 696, 700-06 (1983);

[27] *See, e.g.*, *United States* v. *Arvizu*, 534 U.S. 266 (2002); *United States* v. *Cortez*, 449 U.S. 411 (1981); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878-82 (1975).

investigative circumstance and the sanctity of the individual." *Terry*, 392 U.S. at 26.[28]

Second, the Court in *Terry* also emphasized that intrusions on individual liberty must be limited to the scope necessary to effect the legitimate purpose of the seizure: "The manner in which the seizure and search [are] conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." *Id.* at 28. "[T]he investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500.

Although the Court in *Terry* declined to dictate the permissible limits of such stops, Justice White in his concurrence emphasized that the individual retained a right to refuse to answer any questions, which should include questions concerning identity:

> [G]iven the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, *the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest*....

[28] Some lower courts, however, have upheld *Terry* encounters based on officer suspicions of crimes less serious than those justifying the *Terry* encounters upheld by the Court to date. *See, e.g.*, *State* v. *Brooks*, 560 N.W.2d 180, 186 (Neb. Ct. App. 1997) (upholding *Terry* encounter based on suspicion that defendant was violating indecent exposure ordinance); *State* v. *Claussen*, 353 N.W.2d 688, 690 (Minn. Ct. App. 1984) (upholding *Terry* stop based on suspicion of violation of alcohol consumption by minors); *Mayo* v. *State*, 382 So. 2d 327, 328-29 (Fla. Dist. Ct. App. 1980) (per curiam) (upholding *Terry* stop based on officer's knowledge that defendants were leaving private property where young people frequently trespassed); *State* v. *Fitzgerald*, 620 A.2d 874, 875 (Me. 1993) (upholding *Terry* encounter based on suspicion of littering).

Terry, 392 U.S. at 34 (White, J., concurring) (emphasis added).

Since *Terry*, the Court has on numerous occasions echoed Justice White's view. Most significantly, in *Berkemer* v. *McCarty*, 468 U.S. 420 (1984), the Court embraced fully the limits of *Terry* articulated by Justice White:

> [T]he stop and inquiry must be 'reasonably related in "scope to the justification for their initiation.'" *Ibid.* [quoting *Terry* v. *Ohio*]. Typically, this means that the officer must ask the detainee a moderate number of questions *to determine his identity* and try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obligated to respond.* And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.

Id. at 439-40 (emphases added) (footnote omitted). In *Davis* v. *Mississippi*, 394 U.S. 721 (1969), the Court similarly recognized the "settled principle" that "while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Id.* at 727 n.6.[29]

[29] The related First Amendment right to anonymity repeatedly recognized by the Court also bears on the unreasonableness of identification demands by law enforcement. *See, e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Village of Stratton*, 536 U.S. 150, 166 (2002); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958). As the Court has recognized, "[a]nonymity is a shield from the tyranny of the majority." *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (citing J.S. Mill, *On Liberty and Considerations on Representative Government* (R. McCallum ed. 1947)).

C. Identification Requirements Are Particularly Unreasonable When Applied to Homeless Persons.

As the Court recognized in *Terry* itself, "[the] inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry*, 392 U.S. at 8-9. The "reasonable articulable suspicion of criminal activity" requirement, however, offers significantly less protection to the homeless "citizen[s] on the streets of our cities." *Id.*

1. Homeless Persons Are Frequently Subjected To Law Enforcement Encounters.

The prevalence of "quality of life" crimes and the unfettered application of the *Terry* criteria on the streets conspire to render homeless individuals vulnerable to stop and frisk encounters. The harsh realities of life on the street force homeless individuals to act in ways that reasonably give rise to a reasonable articulable suspicion of violations of public nuisance laws (however unreasonable such laws themselves may be), such as those against loitering, sleeping in public, panhandling and public encampment. Because homeless people are more prone to being subjected to *Terry* encounters, they are more often confronted by the intrusiveness of being forced to disclose their identity to police, regardless of their innocence or guilt. As a result, statutes like Nev. Rev. Stat. 171.123(3) pose a palpable threat to homeless persons' "right to be let alone" because they allow law enforcement to bootstrap charges onto what are essentially status crimes.[30] Unlike persons who have a

[30] *See Robinson* v. *California*, 370 U.S. 660, 678 (1962) (Douglas, J., concurring) ("We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick"); *Powell* v. *Texas*, 392 U.S. 514, 521-22, 532 (1968) (plurality); *Lambert* v. *California*, 355 U.S. 225, 229 (1957).

Although this Court has not addressed the constitutionality of a statute criminalizing homelessness under an Eighth Amendment analysis, several federal courts have held that efforts to criminalize conduct associated with homeless people to be violative of the Eighth Amendment. *See, e.g.*, *Pottinger* v. *City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992). In *Pottinger*, a class action alleged that the Miami police routinely arrested homeless people for harmless and necessary acts such as sleeping, sitting or eating in public, despite insufficient shelter space in the city. *See id.* In holding that punishment for such conduct violates the Eighth Amendment, the Court concluded that "[t]he harmless conduct for which [the homeless] are arrested is inseparable from their involuntary condition of being homeless." *See id.*

residence to which they can retreat and maintain their privacy, homeless persons, by definition, must remain in public.

The practical application of *Terry*'s guidelines, moreover, provides law enforcement personnel a basis to question most homeless people at their whim and caprice. This is most apparent when that *Terry* encounter is justified by the mere suspicion of criminal activity. By way of example, if a disheveled, "homeless-looking" person is observed late in the evening holding a blanket folded under his arm, then this innocent act still could create a reasonable articulable suspicion that this person will be sleeping in public. As a result, such a person, posing no threat to police or public safety, could nonetheless be stopped wherever sleeping in public is prohibited by law.[31] A person with the same appearance observed with a shopping cart containing collapsed cardboard boxes could likewise raise a reasonable suspicion that this person may be about to erect a shelter.[32] Indeed, merely "lodging" in a public place without permission would justify a *Terry* encounter in Nevada.[33] And

[31] *See, e.g.*, Dallas, Tex.,City Code § 31-13(a)(1) (prohibiting "sleeping or dozing in a street, alley, park, or other public place").

[32] Such shelters could well be illegal under, for example, Cal. Penal Code § 647(j) (prohibiting "lodg[ing] in any [public] building, structure, vehicle, or place ... without the permission of the owner or person entitled to [its] possession or ... control").

[33] *See* Nev. Rev. Stat. 207.030(1)(g) ("It is unlawful to ... [l]odge in any building, structure or place, whether public or private, without the

upon such a *Terry* encounter, the detained homeless person would be subject to Nev. Rev. Stat. 171.123(3)'s intrusive requirement that he disclose his identity upon request.

2. Compliance With Vague Identification Requirements Is Especially Unreasonable For Homeless People Given Their Difficulties In Obtaining Identification.

The scope of the Nevada statute is unreasonable for the further reason that it ambiguously requires that the detained individual "identify himself." Nev. Rev. Stat. 171.123(3). The term "identify" is nowhere defined, however, and is subject to differing interpretation as to what identification requires.[34] As a result, it is unclear whether the Nevada statute requires merely that the person tell the officer his name or provide more formal documentary identification.

Nev. Rev. Stat. 171.123 is thus infected with even more vagueness than the statute struck down in *Kolender* v. *Lawson*, 461 U.S. 352 (1983). There, the Court invalidated a similar "stop-and-identify" statute, which required the provision of "'credible and reliable' identification" and an accounting of one's presence upon request by a police officer during a lawful *Terry* stop. *Id.* at 356. Although the Court invalidated the statute as void for vagueness, the Ninth Circuit

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permission of the owner or person entitled to the possession or in control thereof.")

[34] Facial rejection of Nev. Rev. Stat. 171.123 is appropriate because it fails to give a reasonable opportunity to distinguish lawful from unlawful conduct, *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983), and vests unbridled discretion in a government official over whether to punish conduct that may be constitutionally permissible, *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162-63 (1972); *see also City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999) (Stevens, J.) ("'It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.'") (quoting *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-03 (1966)).

also considered the law to violate the Fourth Amendment. See *Lawson* v. *Kolender*, 658 F.2d 1362 (9th Cir. 1981), *aff'd*, 461 U.S. 352 (1983). Such rules indeed represent a dangerous opportunity for abuse in that they "entrust[] lawmaking to the moment-to-moment judgment of the policeman on his beat." See *Kolender*, 461 U.S. at 360 (alteration and internal quotation marks omitted); see also *City of Chicago* v. *Morales*, 527 U.S. 41, 65 (1999) (O'Connor, J., concurring).

The prospect of Supreme Court approval of laws that require formal identification to be carried would be particularly unreasonable for homeless individuals who face significant difficulties in obtaining such documentation. *See supra* at 14-15. Too many states still require proof of permanent residence before issuing an identification card. *See id.* It is a sad irony that lack of proof of residence can often be the main obstacle a homeless person faces in obtaining formal identification.

Even if homeless persons are able to obtain state-issued identification, it is difficult for homeless individuals to retain such documents, as they often have no secure place in which to store them. See *supra* note 25. Lacking the personal security of a home, homeless individuals are also particularly vulnerable to theft of their IDs, particularly given the potential street value of such documents.

Requiring identification to be produced when by law that identification is either actually or practically impossible for homeless people to obtain could not be "reasonable" within the meaning of the Fourth Amendment standard. Such a law would, in effect, penalize homeless persons for their status of lacking a residence. See *supra* note 30.

3. A Bright-Line Rule That A Person May Remain Silent During A *Terry* Stop Is Necessary To Protect The Privacy Right Of Homeless People.

The context of homelessness underscores the need to preserve the narrowness of a lawful *Terry* exception by reaffirming the right to refuse to identify oneself during such an encounter. Only a bright-line rule recognizing the fundamental right to refuse to self-identify can meaningfully protect the privacy rights of homeless people. Few people – much less homeless individuals – would ever be able to ascertain whether an officer has such a reasonable suspicion or if such a suspicion is lacking and the person is free to walk away. And the rule must be clear enough that professional law enforcement personnel have practical guidance during their investigation.

Only a clear, bright-line rule that a suspect may remain silent will protect the constitutional principles of the Fourth Amendment and its protection of individual privacy. Such a rule would not only be consistent with the principles underlying the Fourth Amendment, but also would help to ensure that the many *Terry* encounters with homeless people are only as intrusive as is necessary. This reaffirmation of the Fourth Amendment is thus faithful to *Terry*'s promise that its guarantees belong also to the "citizen on the streets of our cities." *Terry*, 392 U.S. at 8-9.

At the end of the day, identification requirements such as Nevada's offer the potential for significant abuse of homeless individuals by law enforcement – a potential that has too often been realized. At times, the main application of such requirements with respect to most offenses has been to bootstrap a minor offense into serving as the basis for a more substantive arrest. Such searches are neither reasonable for any citizens nor necessary for police, and are particularly absurd when one considers the "quality of life" offenses of which homeless persons are often suspected. The freedom of

citizens from unreasonable searches and seizures must not fail to protect those who are the least among us.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's brief, the decision below should be reversed.

Respectfully submitted,

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LARRY D. HIIBEL,

Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA AND THE COUNTY OF HUMBOLDT AND THE HONORABLE RICHARD A. WAGNER, DISTRICT JUDGE,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Nevada

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonpartisan, nonprofit organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and in this Nation's civil rights laws. The ACLU of Nevada is one of the ACLU's statewide affiliates. Since its founding in 1920, the ACLU has frequently appeared before this Court, both as direct counsel and as *amicus curiae*. In particular, the ACLU has participated in numerous cases involving the proper scope and meaning of the Fourth Amendment to the United States Constitution. Because this case raises important Fourth Amendment questions, its resolution is a matter of significant concern to the ACLU and its members.[1]

STATEMENT OF THE CASE

On May 21, 2000, Humboldt County, Nevada Sheriff's Department Deputy Lee Dove responded to a report that an individual had been observed striking a female passenger in a truck. Upon his arrival at the scene, Deputy Dove saw Petitioner Larry Hiibel, who appeared to be intoxicated, standing next to a parked truck occupied by a minor. Deputy Dove approached, and asked Petitioner to identify himself. Petitioner refused "because he did not

[1] Letters of consent to the filing of this brief have been lodged with the Court, pursuant to Rule 37.3; pursuant to Rule 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel has made a monetary contribution to its preparation or submission.

believe he had done anything wrong." *Hiibel v. Sixth Judicial Dist. Ct.*, 59 P.3d 1201, 1203 (Nev. 2002).

After eleven unheeded requests for identification, Deputy Dove placed Petitioner under arrest. He explained his actions as follows:

> [D]uring my conversation with Mr. Hiibel, there was a point where he became somewhat aggressive. I felt based on me not being able to find out who he was, to identify him, I didn't know if he was wanted or what [h]is situation was, I [w]asn't able to determine what was going on crimewise in the vehicle, based on that I felt he was intoxicated, and how he was becoming aggressive and moody, I went ahead and put him in handcuffs so I could secure him for my safety, and put him in my patrol vehicle.

Id. Thereafter, Petitioner was charged with, and convicted of, resisting a public officer, in violation of Nevada Revised Statutes § 199.280, based upon his refusal to identify himself when requested to do so by Deputy Dove, as required by Nevada Revised Statutes § 171.123(3).[2]

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[2] Section 171.123 of the Nevada Revised Statutes provides, in pertinent part:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
>
> * * *
>
> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so

(Continued on following page)

On appeal, Petitioner challenged the constitutionality of Nevada Revised Statutes § 171.123(3) on the grounds that an individual detained by a police officer based only upon the officer's reasonable suspicion of criminal activity, as permitted by *Terry v. Ohio*, 392 U.S. 1 (1968), cannot be compelled under penalty of law to identify himself during the course of that temporary detention, in violation of rights secured by the Fourth and Fifth Amendments to the United States Constitution. The Nevada Supreme Court upheld Petitioner's conviction, holding that the statute's command satisfied the Fourth Amendment because the "public interest in requiring individuals to identify themselves to officers when a reasonable suspicion exists is overwhelming." *Hiibel*, 59 P.3d at 1205. According to the majority, providing one's name "is far less intrusive than conducting a pat-down search of one's physical person," permitted by *Terry*. *Id.* at 1206. In particular, the court held the statute's self-identification requirement constitutional under the Fourth Amendment because "[a]n ordinary person would conclude that it was [Petitioner] who was unreasonable, not the law." *Id.* at 1207.

Three justices of the Nevada Supreme Court dissented, finding the court's holding to be an exaggerated and unwarranted reaction "to the public's fear during this time of war 'against an enemy who operates with a concealed identity.'" *Id.* at 1209. They concluded that the

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> detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.
>
> 4. A person may not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes.

statute violated the Fourth Amendment because this Court "has consistently recognized that a person detained pursuant to *Terry* 'is not obliged to answer' questions posed by law enforcement officers," and because the individual's "security outweighed any potential link leading to arrest that could be gleaned from his identity." *Id.* at 1208. This Court granted certiorari to determine whether the State may compel people to identify themselves (during a police investigation) when they are being seized upon less than probable cause.

SUMMARY OF ARGUMENT

Justice Brandeis famously observed that the Fourth Amendment to the United States Constitution embodies an individual's "right to be let alone," an entitlement constituting the "most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 227 U.S. 438, 478 (1928) (Brandeis, J., dissenting). This Court has long held that the Fourth Amendment protects this "inestimable right of personal security," *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968), by prohibiting the search and seizure by the police of an individual's person in the absence of probable cause. *Florida v. Royer*, 460 U.S. 491, 498 (1983). In *Terry v. Ohio*, 392 U.S. at 27-30, the Court recognized "a limited exception to this general rule," allowing a law enforcement officer to briefly detain a person on the street based upon a reasonable suspicion of criminal activity, and to frisk the person for concealed weapons. *See also United States v. Sokolow*, 490 U.S. 1, 17 (1989).

Because *Terry* represented a departure from the constitutional mandate of probable cause, this Court has maintained it as a narrowly defined exception defined solely by its underlying purpose. *See Dunaway v. New York*, 442 U.S. 200, 207-09 (1979). Thus, while *Terry* allows a police officer to "ask the detainee a moderate number of questions to determine his identity and try to obtain information confirming or dispelling the officer's suspicions," this Court has also held that the individual detained "is not obliged to respond" to such questions, and must be released unless his "answers provide the officer with probable cause to arrest him." *Berkemer v. McCarty*, 468 U.S. 420 (1984).

Here, Nevada Revised Statutes § 171.123(3), which compels an individual stopped by the police to identify himself, under penalty of law, circumvents the Fourth Amendment's probable cause requirement by authorizing an arrest based solely upon the individual's exercise of his right *not* to answer questions posed to him by the police under such circumstances, and thereby manufactures probable cause in a *Terry* context in which it is, by definition, otherwise absent. *See* Point I, *infra*. Moreover, although the Nevada Supreme Court concluded that compelled self-identification is a "reasonable" intrusion upon an individual's Fourth Amendment rights to privacy and security because it advances the general objectives of crime prevention and detection, the court's decision fails to substantiate any *specific* law enforcement interest that might justify such a serious abridgement of those rights, as required by *Terry* and its progeny. *See* Point II, *infra*.

As discussed below, the State of Nevada may not override the probable cause requirement of the Fourth Amendment by legislating a system in which silence is

sufficient to transform reasonable suspicion into the probable cause necessary to arrest. Yet, that is both the purpose and effect of Nevada Revised Statutes § 171.123(3), which criminalizes constitutionally protected behavior, and authorizes arrests based on conduct that would not otherwise amount to probable cause. Accordingly, this Court should hold that Section 171.123(3) violates the Fourth Amendment to the United States Constitution.

ARGUMENT

I. NEV. REV. STAT. § 171.123(3) IS UNCONSTITUTIONAL BECAUSE THE FOURTH AMENDMENT PROTECTS AN INDIVIDUAL SUBJECT TO A *TERRY* STOP FROM BEING COMPELLED TO RESPOND TO QUESTIONS POSED BY THE POLICE.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . . " This "right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry*, 392 U.S. 1, 8-9 (1968). Generally, this right may not be intruded upon by the government absent probable cause, *see Dunaway v. New York*, 442 U.S. 200, 208 (1979); indeed, it is the probable cause requirement that "safeguard[s] citizens from rash and unreasonable interferences with [their] privacy." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). Nevertheless, in *Terry v. Ohio*, *supra*, this Court held that, even in the absence of probable cause, a law enforcement officer may briefly

detain a person on the street, based upon a reasonable suspicion of criminal activity, for the limited purpose of investigating the circumstances that provoked suspicion in the first instance. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) ("[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'"). Moreover, in connection with such a temporary investigative detention, the police officer may frisk the person to protect himself from the immediate threat posed by concealed weapons, where the officer "has reason to believe that he is dealing with an armed and dangerous individual." *Terry*, 392 U.S. at 27. *See Ybarra v. Illinois*, 444 U.S. 85, 93 (1979); *Adams v. Williams*, 407 U.S. 143 (1972).

Because *Terry* represented an exception to "long prevailing standards" of probable cause, *Brinegar*, 338 U.S. at 176, this Court has maintained the "stop and frisk" exception to the Fourth Amendment's probable cause requirement, carved out in *Terry*, as an exceedingly narrow one. *United States v. Place*, 462 U.S. 696 (1983); *Dunaway*, 442 U.S. at 210. In particular,

1) the "investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop," *Florida v. Royer*, 460 U.S. 491, 500 (1983) (citations omitted);

2) the investigative methods utilized must be "the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time," *id.*, and;

3) most significantly for purposes of this case, the police officer may question the individual detained, but the individual "need not answer

> any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Id.* at 497-98.

Failure to observe these limits converts a *Terry* encounter into a full-fledged arrest under the Fourth Amendment that can only be justified by probable cause. *Royer*, 460 U.S. at 1325; *Dunaway*, 442 U.S. at 216; *Brignoni-Ponce*, 422 U.S. at 881-82.

In enacting and enforcing Section 171.123(3), the State of Nevada has circumvented the Fourth Amendment's probable cause requirement by authorizing its law enforcement officers to arrest an individual seized on the basis of reasonable suspicion, and with respect to whom probable cause is lacking, based solely upon the individual's exercise of his constitutionally protected right to remain silent under such circumstances. By criminalizing the mere refusal to identify oneself, the State impermissibly infringes not only the individual's Fifth Amendment privilege against self-incrimination, as addressed by other respected *amicus*, *see Brief of Amicus Curiae Electronic Frontier Foundation*,[3] but also, as discussed below, his right under the Fourth Amendment to remain "secure in his person" by refusing to answer questions posed to him

[3] *See generally Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (the Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or *informal*, where the answers might incriminate him in future criminal proceedings") (emphasis added); *Haynes v. United States*, 390 U.S. 85, 97 (1968) (disclosure of identity in a criminal area of inquiry involves "real and appreciable" hazards of self-incrimination).

by the police until such time as the police have probable cause to effect his arrest. Moreover, where probable cause is otherwise absent, the Fourth Amendment precludes the State from legislating a regime in which silence alone is sufficient to transform mere reasonable suspicion into the probable cause necessary to arrest an individual. Because that is both the purpose and effect of Section 171.123(3), the statute is unconstitutional, and the judgment of the Supreme Court of Nevada must be reversed.

Of course, a police officer executing a *Terry* stop may attempt to expand upon the reasonable suspicion that gave rise to the stop in the first instance by asking questions of the individual detained. However, "[i]f the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way." *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). *See Brinegar*, 338 U.S. at 177 ("The citizen who has given no good cause for believing he is engaged in [criminal] activity is entitled to proceed on his way without interference"). In this regard, an individual subjected to a *Terry* stop cannot be compelled under penalty of law to answer questions and, thereby, run the risk of himself providing the probable cause necessary for the officer to effect a full-blown arrest. Rather, this Court has repeatedly recognized that an individual has an absolute right under the Fourth Amendment *not* to respond to questions posed to him by a law enforcement officer during a seizure predicated on less than probable cause.

Although the majority in *Terry* did not address this issue directly, Justice Harlan explained in his concurring opinion that while a police officer (like every other citizen) is free to pose questions to persons standing on the street, "the person addressed has an equal right to ignore his

interrogator and walk away." 392 U.S. at 32-33 (Harlan, J., concurring). Similarly, Justice White explained in his separate concurring opinion that, during a *Terry* stop, "the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for arrest." *Id.* at 34.

Since *Terry* was decided, the Court has both implicitly and explicitly reinforced this "settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Davis v. Mississippi*, 394 U.S. 721, 727 (1969). In *Adams v. Williams*, 407 U.S. 143 (1972), cited by Respondents in support of the proposition that compelled self-identification is part and parcel of the *Terry* exception, *see, e.g.,* Opp'n Cert. at 10, the Court noted the admitted rule that an officer may inquire regarding an individual's identity as part of his investigation during a *Terry* stop. *Id.* at 146 (citations omitted). But *Adams* does not hold, as Respondents suggest, that simply because an officer may inquire, the individual is therefore required to respond. To the contrary, the Court in *Adams* went no further than to delineate the permitted scope of a *police officer's* inquiry; it did not purport to address the obligation of the *individual detained* to cooperate with the investigation, much less compel that individual to respond to the questions posed to him.

In *Florida v. Royer*, this Court held that when an officer approaches an individual without reasonable suspicion or probable cause, the individual has a right to ignore the police and go about his business, and made clear that such individual has a fundamental right to

decline to respond to any questions posed to him by the police:

> The person approached . . . need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

460 U.S. at 497-98 (citations omitted). *See also Brown v. Texas,* 443 U.S. 47, 52 (1979) (holding that the conduct of the arresting officer was unconstitutional because "the only reason he stopped appellant was to ascertain his identity," which did not constitute the reasonable suspicion required by *Terry*); *Kolender v. Lawson*, 461 U.S. 352, 369 (1983) (explaining that "probable cause, and nothing less, represents the point at which the interests of law enforcement justify subjecting an individual to any significant intrusion beyond that sanctioned in *Terry*, including either arrest or the need to answer questions that the individual does not want to answer") (Brennan, J., concurring).

In *Berkemer v. McCarty*, 468 U.S. 420 (1984), a unanimous Court – relying upon Justice White's concurring opinion in *Terry* – expanded this principle to the *Terry* context, holding that an individual stopped pursuant to *Terry* is not "in custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966), precisely *because* the individual remains free to ignore or otherwise decline to respond to an officer's questions. As the Court explained:

> [In a *Terry* stop] the officer may ask the detainee a moderate number of questions to determine his identity and try to obtain information confirming

> or dispelling the officer's suspicions. *But the detainee is not obliged to respond.* And, unless the detainee's answers provide the officer with probable cause to arrest him, he must be released.

Berkemer, 468 U.S. at 439-40 (emphasis added) (citing *Terry*, 392 U.S. at 34 (White, J., concurring)). Thus, the entirety of this Court's jurisprudence has emphasized the limited scope of an encounter between a law enforcement officer and a citizen which is premised upon less than probable cause. Specifically, these cases have repeatedly recognized that a fundamental facet of such encounters, including the limited seizures authorized by *Terry*, is the individual's Fourth Amendment right to refuse to respond to any question posed to him.

Moreover, a necessary corollary of this right, also implicit in this Court's jurisprudence, is that the refusal to answer questions posed by the police cannot, without more, transform reasonable suspicion into probable cause. This Court has repeatedly held that an individual "may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Royer*, 460 U.S. at 498 (citing *United States v. Mendenhall*, 446 U.S. 544, 556 (1980)). *See also Florida v. Bostick*, 501 U.S. 429, 437 (1991) ("We have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure"). Just as the refusal to answer questions cannot give rise to the "reasonable suspicion" necessary for a police officer to effect a *Terry* stop in the first instance, *Brown,* 443 U.S. at 53, so too where an individual has been stopped based upon a mere suspicion of criminal activity, his "refusal to answer furnishes no basis for arrest, although it

may alert the officer to the need for continued observation." *Terry*, 392 U.S. at 34 (White, J., concurring). Thus, if a person refuses to answer questions during a *Terry* stop, the police are left with only "a particularized and objective basis for suspecting [him] . . . of criminal activity," *United States v. Cortez*, 449 U.S. 411, 417-18 (1981), but no basis for further detention, let alone the probable cause required to effect his arrest. For example, in *Illinois v. Wardlow*, this Court held that unprovoked flight from a police officer, in combination with other factors (such as location), may give rise to reasonable suspicion justifying a *Terry* stop. 528 U.S. at 124-25. In explaining this decision, the Court specifically noted that "[a]llowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the individual's right to go about his business *or to stay put and remain silent* in the face of police questioning." *Id.* (emphasis added).

The Fourth Amendment expresses the recognition that the power to arrest is among the greatest intrusions on individual liberty; the social, legal and human consequences of this power have thus led the Court to refrain from unduly expanding the right of law enforcement officers to demand compliance from individuals briefly detained pursuant to the limited investigatory stops condoned in *Terry*. The statute in question, Nev. Rev. Stat. § 171.123, seeks to upset this balance by legislating an exception to the individual's established right to refuse to identify himself in such an encounter, thereby purporting to manufacture probable cause where it does not otherwise exist. Indeed, the statute creates a state-sanctioned backdoor for arrest if an officer has no more than a reasonable suspicion that a crime may have occurred: where

an individual fails to allay the officer's suspicions by refusing to identify himself, the police may then expand the scope of the confrontation, and the attendant Fourth Amendment intrusion, by arresting the individual for violating the self-identification statute, and conducting a far more extensive search incident to that arrest. *See Michigan v. DeFillippo*, 443 U.S. 31, 40 (1979) (Blackmun, J., concurring); *see also United States v. Robinson*, 414 U.S. 218, 227-28 (1973) (while a *Terry* frisk is "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby," a search incident to arrest is "justified on other grounds, and can therefore involve a relatively extensive exploration of the person"). However, a statute which serves as "merely the cloak" for arrests which would not otherwise be lawful is a pernicious affront to the Fourth Amendment and cannot be upheld. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) ("a direction by a legislature to the police to arrest all 'suspicious persons' would not pass constitutional muster"). Thus, contrary to the Supreme Court of Nevada's declaration that Fourth Amendment rights "hold their own when a certain point is reached," *Hiibel*, 59 P.3d at 1206, a statute that compels self-identification, and thereby disregards the constitutionally significant distinction between reasonable suspicion and probable cause, represents an unjustified expansion of *Terry* and must be invalidated.

In short, the State of Nevada may not criminalize by statute conduct that is constitutionally protected. *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) (holding that the State may not make "a crime out of what under the Constitution cannot be a crime"). *See also Kolender,* 461 U.S. at 366-67 (Brennan, J., concurring) (noting that the States

"cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a *Terry* encounter, any more than it could abridge the protections of the Fifth and Sixth Amendments by making it a crime to refuse to answer police questions once a suspect has been taken into custody"). Yet, Nevada Revised Statutes § 171.123(3) seeks to do just that by requiring a person to respond to questions regarding his identity at a time when he has the right to refuse to do so. Accordingly, Section 171.123(3) runs afoul of the Fourth Amendment, and should be declared unconstitutional.

II. COMPELLING AN INDIVIDUAL SUBJECT TO A *TERRY* STOP TO IDENTIFY HIMSELF IS NOT A REASONABLE INVASION OF THE INDIVIDUAL'S FOURTH AMENDMENT RIGHT TO BE SECURE IN HIS PERSON.

The Nevada Supreme Court upheld the constitutionality of Nevada Revised Statutes § 171.123(3) on the grounds that compelling an individual subject to a *Terry* stop to identify himself was a "reasonable" intrusion upon the individual's Fourth Amendment rights because it advanced a legitimate law enforcement objective, and was much less of an invasion than the frisk for weapons permitted by this Court in *Terry*. As discussed below, the mere fact that an additional intrusion upon an individual's constitutionally protected privacy and security interests might advance the objectives of law enforcement is never enough to ignore or override those constitutional rights. Moreover, compelling an individual to answer questions posed to him is a significant intrusion upon that person's privacy, which is not at all akin to a frisk for weapons, and which cannot be justified on that basis.

This Court has recognized that a *Terry* stop represents a significant infringement of an individual's personal security:

> It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. And it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a "search." Moreover, it is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

Terry, 392 U.S. at 16-17. Nevertheless, the Court in *Terry* balanced the intrusion upon the individual's Fourth Amendment right to privacy and security against "the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967), and ultimately permitted a brief stop based upon reasonable suspicion because of its temporary nature and limited scope. *Terry*, 392 U.S. at 20. As the Court explained, however, the "crux" of the *Terry* case was not the "propriety" of the police officer taking steps to investigate the suspicious behavior he had witnessed by stopping Terry but, rather, "whether there was justification for [the officer's] invasion of Terry's personal security by searching him for weapons in the course of that investigation." *Id.* at 23. Ultimately, the Court concluded that the

frisk attendant to the stop was permissible because of "the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Id.* Thus, the frisk was deemed to be a reasonable intrusion of the individual's security because it was necessary to, and *actually would*, protect the police officer from the *immediate* threat posed by a potential concealed weapon. *Id.* at 25-26.

Even a search for weapons of the sort approved in *Terry* "must, like any other search, be strictly circumscribed by the exigencies which justify its initiation." *Id.* at 26. For example, where an item is discovered in plain view during a search authorized by a warrant, this Court has prohibited law enforcement officers from so much as slightly moving the item to confirm that it is contraband because "taking action, unrelated to the objectives of the authorized intrusion . . . produce[s] a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the [initial search]." *Arizona v. Hicks*, 480 U.S. 325-26 (1987) (holding that plain view exception did not permit police officer to move item discovered in plain view even slightly in order to reveal serial numbers because such action constituted an unauthorized invasion of the individual's privacy unjustified by the interest justifying the initial intrusion). *See also Minnesota v. Dickerson*, 508 U.S. 366, 379 (1993) (holding that frisk violated Fourth Amendment where "incriminating character of the object was not immediately apparent" to the officer, who "determined that the item was contraband only after conducting a further search, one not authorized by *Terry* or by any other exception to the warrant requirement").

Similarly under *Terry*, even though the intrusion upon an individual's privacy and security occasioned by a search for weapons is reasonable under the Fourth Amendment, this Court has never expanded *Terry* to allow more wide-ranging searches of an individual stopped on the street in the absence of probable cause. This is so even where the additional intrusion might further the State's general interest in crime prevention and detection. *See United States v. Sharpe*, 470 U.S. 675, 691 (1985) (Marshall, J., concurring) ("Regardless how efficient it may be for law enforcement officials to engage in prolonged questioning to investigate a crime, or how reasonable in light of law enforcement objectives it may be to detain a suspect until various inquiries can be made and answered, a seizure that in duration, scope, or means goes beyond the bounds of *Terry* cannot be reconciled with the Fourth Amendment in the absence of probable cause."). Rather, the Court has insisted that the interest justifying the additional intrusion be sufficiently specific to outweigh the individual right to be forfeited. *See Kolender,* 461 U.S. at 367 (noting that interest justifying expansion of *Terry*'s explicitly limited exception to probable cause requirement must be more particular than the "general facilitation of police investigation and preservation of public order").

By compelling an individual subject to a *Terry* stop to identify himself, and by threatening the arrest of those who refuse, Section 171.123(3) authorizes significantly more than a "minimal" intrusion upon an individual's well-established interests in personal privacy and security. Rather, it obliterates the right to remain silent and to not respond in the face of police inquiry, a right protected by both the Fourth Amendment, *see supra*, Point I, and the Fifth Amendment, *see Brief of Amicus Curiae Electronic*

Frontier Foundation. The critical issue is not – as the Nevada Supreme Court perceived, 59 P.3d at 1206 – whether compelling an individual to identify himself is more or less intrusive than a frisk for weapons but, rather, whether this additional intrusion upon the individual's security, compelled by the statute, is reasonably justified by the interests that supported the initial intrusion. Simply stated, it is not.

First, the stop aspect of a *Terry* encounter is tolerated because a police officer (like every other citizen) is free to address questions to persons standing on the street, and the *posing* of such questions constitutes a relatively minor intrusion upon the individual's personal security. Such a stop is "reasonable," in a constitutional sense, because of the existence of a reasonable suspicion of criminal activity, combined with the fact that citizens are routinely confronted by others on the street as a matter of course. It is obvious on its face that these same interests are inapplicable to a citizen's response when so confronted: the entreaties of vendors, credit card salesmen, beggars, proselytizers, people in need of change for parking meters, and even police officers are often ignored on the street. The fact that one's identity is shared under agreeable circumstances, *cf. Hiibel*, 59 P.3d at 1206 (noting that "it is merely polite manners to introduce ourselves when meeting a new acquaintance"), does not mean that the State may compel it in circumstances a citizen may find less favorable.

Moreover, it does not legally or logically follow from the fact that the "reasonableness" of a police officer's conduct is, as it must be, considered in determining whether the officer's stop and frisk was allowable under the Fourth Amendment, that the "reasonableness" of the

subject individual's conduct (i.e., his decision not to identify himself) must also be considered in determining whether it is constitutionally permissible for the police to compel the individual to answer. *Cf. Hiibel*, 59 P.3d at 1206 ("Reasonable people do not expect their identities – their names – to be withheld from officers."). As discussed above, an individual has a constitutional right *not* to respond to police inquiries, regardless of whether it would actually be *more* reasonable for him to answer the questions and be on his way. *See, e.g., Berkemer v. McCarty,* 468 U.S. at 439. That is, "reasonableness" serves as a limitation upon state action, not upon the conduct of its citizens. *See Terry*, 392 U.S. at 19-20 ("[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one – whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.").

Second, the scope of a *Terry* stop may be expanded under certain circumstances to allow a police officer to frisk the individual detained. This expansion is permitted based upon the substantial threat that may be posed by a concealed weapon, a threat quickly neutralized by the frisk permitted under *Terry*. *See Sibron v. New York*, 392 U.S. 40, 65 (1968) (holding that the *Terry* exception was created for "the protection of the officer by disarming a potentially dangerous man"). And, of course, even beyond a weapons frisk, the police have an array of investigatory tools at their disposal during a *Terry* stop, including:

> The threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Mendanhall, 446 U.S. at 554. *See Graham v. Conner*, 490 U.S. 386 (1989); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (order to get out of car is permissible in *Terry* stop as *de minimis* intrusion). All such tactics, however, are specifically designed to address the *immediate* threat to the police officer's safety at the outset of a *Terry* confrontation.

The same is not true of compelled disclosure of a person's identity. It is exceedingly unlikely that the immediate disclosure of an individual's identity will substantially, or even minimally, forestall any threat to the officer executing the search. Certainly the Nevada Supreme Court was not presented with any evidence of such effect. *See Hiibel*, 59 P.3d at 1209 (Agosti, J., dissenting) (noting that the majority "does not provide any evidence that an officer, by knowing a person's identity, is better protected from potential violence"). Nor can the mere invocation by the court of the amorphous threat posed by sex offenders, terrorists, and the like, 59 P.3d at 1206, combined with its unsubstantiated assertion that compelled self-identification will somehow combat those evils, warrant the abridgement of a citizen's Fourth Amendment rights to privacy and security.

The balancing of interests set forth in *Terry* preserves the most critical Fourth Amendment protections, those which are threatened when the police act on less than the constitutionally required finding of probable cause. The Nevada Supreme Court's oversimplification of an individual's Fourth Amendment rights to privacy and security – both during and outside of a *Terry* detention – grossly

minimizes the "severe" and "frightening" intrusion inherently present when one is detained even briefly by a police officer. *Terry,* 392 U.S. at 24-25. Moreover, the requirement that an individual identify himself, or risk incarceration, goes well beyond the limited intrusion contemplated by *Terry* and its progeny, which was reasonably related to specific and articulable interests above and beyond the State's general interest in crime prevention and detection. For these reasons, the alleged benefits of a requirement that a person subject to a *Terry* stop identify himself to the detaining police officer, as required by Nevada Revised Statutes § 171.123(3), is substantially outweighed by the individual's countervailing interest in privacy and security, as protected by the Fourth Amendment. Accordingly, the statute should be held unconstitutional.

CONCLUSION

For the reasons set forth above, the Court should hold Nevada Revised Statute § 171.123(3) unconstitutional under the Fourth Amendment, and reverse the judgment of the Supreme Court of Nevada.

Respectfully submitted,

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In the Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amicus will address the following question:

Whether a statute that protects police officers by requiring that persons detained in *Terry* investigative stops provide officers with their names, and only their names, is reasonable under the Fourth Amendment, does not require providing incriminating evidence triggering the protection of the Fifth Amendment, and would not deter free speech in violation of the First Amendment.

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INTERESTS OF THE AMICUS CURIAE

The National Association of Police Organizations ("NAPO") is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legal advocacy and political action.[1] NAPO was founded in 1978, and now represents 2,000 police unions and associations, 230,000 sworn law enforcement officers, 11,000 retired officers and more than 100,000 citizens who are committed to fair and effective crime control and law enforcement.

NAPO's police officer members put their lives on the line daily, in an effort to serve and protect American citizens. Whether as traffic officers, beat officers, or detectives, NAPO's members are in critical need of self-protective tools in order guard against the risks posed by *Terry* stops and effectively carry out their crime prevention mission.

SUMMARY OF THE ARGUMENT

Nevada's identification statute is carefully drawn to assist police officers in assessing the safety threat posed by detainees during constitutionally permissible *Terry* investigative stops. The Court has acknowledged time and again that officer safety is a weighty governmental interest, particularly in the Fourth Amendment context. Hundreds of officers have died in the past decade during such routine police tasks as traffic stops and field investigations. Law enforcement agencies have studied the criminal histories of those

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of this Court. Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members or its counsel, has made a monetary contribution to the preparation or submission of this brief.

responsible for such attacks, and have identified the leading indicators that a *Terry* detainee may assault an officer. Criminal justice experts have developed techniques to help police officers respond to these objective indicators of risk during field encounters. Knowledge of a detainee's identity and background provides officers with the ability to make potentially life-saving decisions that can be critical to protecting their safety. Nevada's statute allows officers to make these self-protective determinations.

Nevada's statute fits comfortably within the balance struck by the Court's Fourth Amendment precedents. These cases first weigh the State's interest in the challenged practice or rule, and then balance it against the individual's interests. When the safety of this country's police officers is at risk, even invasive measures infringing on personal privacy, such as pat-down frisks and automobile inventory searches, have been upheld as reasonable under Fourth Amendment principles. Nevada's requirement that detainees give their names is restricted to situations in which reasonable suspicion of criminal activity exists and is actually less personally invasive than the physical or vehicle searches upheld as acceptable measures to maintain officer safety. It is therefore reasonable under the Fourth Amendment.

Nor does Nevada's identification measure founder on Fifth Amendment grounds. First, the provision of such neutral information as a name is not the type of "testimonial" act typically subject to constitutional scrutiny. Officers are permitted to obtain fingerprints, voice exemplars and handwriting samples as identification tools because those measures do not independently reveal information relevant to a criminal investigation. A person's name is merely another method of identification, devoid of factual content, and should be placed on the same constitutional footing.

The Court has suggested that a name alone cannot be incriminating, and the Nevada Legislature specifically crafted the statute at issue to ensure that *Terry* detainees who comply with it need not answer additional questions that might elicit genuinely incriminating information. Moreover, it is highly unlikely that the information required by the Nevada statute – a bare name – will itself be a contested element of any offense if a criminal prosecution ensues. For all of these reasons, the statute does not even trigger Fifth Amendment protections.

Even if the Fifth Amendment did apply to the provision of identification required by the Nevada statute, however, that constitutional protection is far from absolute, and may give way to legitimate law enforcement goals. If the Fifth Amendment does not shield traffic violators or arrestees from giving their names, it should not shield those who have aroused police officers' suspicion sufficiently to permit their brief detention from doing the same.

Finally, the First Amendment interest in anonymous speech cited by Petitioner is not implicated by the Nevada statute. The Nevada statute at issue is distinguishable from anti-solicitation measures that have been held unconstitutional in that, unlike those statutes, it will not deter or discourage protected speech by requiring would-be speakers to divulge their names to the listeners they hope to sway. The Court has suggested that speakers may be required to identify themselves to government agencies after completing their protected anonymous speech; the Nevada statute requires no more.

In short, the Nevada statute is designed to further the government's legitimate interest in officer safety during *Terry* stops, and was drafted to ensure that it will yield no more than a name. This weighty interest is paramount in assessing the constitutionality of the statute, particularly because it imposes only minimal

burdens on *Terry* detainees. It intrudes only gently on citizens' personal privacy, does not compel incriminating testimony for use in a criminal case, and does not require individuals to forfeit their right to anonymous speech. Accordingly, the Nevada statute survives Fourth, Fifth and First Amendment scrutiny.

ARGUMENT

I. THE NEVADA STATUTE IS AN APPROPRIATE RESPONSE TO THREATS TO POLICE SAFETY DURING INVESTIGATIVE ENCOUNTERS.

A. *Police Officers Face The Constant Threat Of Attack By Detainees.*

Law enforcement officers put their lives at risk every time they go to work. Over the past decade, more than half a million officers have been assaulted on the job. U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted*, 2002, at 76, at http://www.fbi.gov/ucr/killed/02leoka.pdf (visited Dec. 18, 2003). During that same period 636 officers have been slain in the line of duty. *Id.* at 10. In a 1997 study, almost three-quarters of Chicago police officers reported that they had been physically attacked, and 65 percent said they had been targeted with gunfire. Frank Main, *Cops Facing More Violence, Even As Overall Crime Drops*, CHI. SUN-TIMES, Aug. 27, 2001, at 5.

No officer is immune from the threat of violence. Police officers are killed at every time of the day, every day of the week, and every month of the year. *Law Enforcement Officers Killed and Assaulted*, 2002, *supra*, at Tables 2-4. Male, female, black, white, Asian and American Indian officers, young and old alike – all face the possibility of death because they wear a badge. *Id.* at Tables 5-6. This threat is not limited to obviously risky situations such as hot pursuit of drug

suspects or burglars. Even seemingly routine police work, performed by foot patrolmen and traffic officers, can be fatal. Of the more than 600 officers felled in the past decade, 105 were killed investigating suspicious people or circumstances in a *Terry*-type situation; another 98 were responding to a disturbance call involving a family quarrel or bar fight; and 97 were killed in traffic stops or pursuits. *Id.* at Table 18. Accordingly, interests in officer safety are hardly limited to shoot-outs and car chases; instead, they are very much implicated by brief, but personal, investigative encounters like the one in this case.

B. *Police Officers Can Minimize the Threat Posed by Detainees Using Identification Information.*

1. Law enforcement studies have identified the factors most often associated with attacks on police officers.

Law enforcement experts have long recognized that, when an officer conducts a field interview, his "greatest hazard is the unknown." Thomas F. Adams, *Field Interrogations*, POLICE, Mar.-Apr. 1963, at 26, 28. Consequently, "[w]hen an officer makes a stop, information about the stopped person's dangerousness or past violent activity can save the officer's life." U.S. Dep't of Justice, Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report*, 2001 Update (2001). For instance, one study found that over the fourteen-year period between 1980 and 1994, a stunning 72 percent of the individuals who killed police officers had been arrested at least once in the past. Roger G. Dunham & Geoffrey P. Alpert, CRITICAL ISSUES IN POLICING 600 (3d ed. 1997). Some 53 percent of those responsible for police killings had a prior criminal conviction. *Ibid.* And one-fourth of those individuals were on parole or probation at the time of the killing. *Ibid.* In the past decade, 528 of the 785 individuals known to be responsible for police deaths had a prior criminal

arrest. *Law Enforcement Officers Killed and Assaulted*, 2002, *supra*, at Table 42. This objective evidence linking past arrests and convictions to officer safety threats cannot be dismissed as "speculative," see Pet. Br. at 8. In light of these compelling statistics, it is no surprise that "[o]nce the [field interviewee] has been identified correctly, a large advantage lies with the * * * officer." David E. Zulawski & Douglas E. Wicklander, *Field Interviewing*, LAW AND ORDER 111, 114 (Sept. 1995).

While it is well settled that officers may protect themselves by conducting pat-down frisks for weapons during investigative stops, see *Terry* v. *Ohio*, 392 U.S. 1, 23-24 (1968), that sort of measure will not serve to eliminate dangers to officers conducting those stops. Statistics show that those who assault police officers may resort to hand-to-hand combat or use automobiles as battering rams during confrontations with police officers. Dunham & Alpert, *supra*, at 589. For instance, "[n]early all of the assaults on Wisconsin police officers in 2001 were committed by people using their hands, feet or other parts of their bodies." Tom Held, *Assaults on State Officers Increase for Second Year*, MILWAUKEE JOURNAL-SENTINEL, Dec. 3, 2002, at 1A. And police officers may be slain with their own firearms after a struggle with the assailant. Dunham & Alpert, *supra*, at 589. A pat-down search would do nothing to minimize such threats. Officers killed in these unarmed altercations would have been at least as well armed with information about their detainees as with the constitutional authorization to pat them down for guns.

2. Officers who know the names of their detainees can quickly assess whether they fit the profile of one likely to assault them.

For decades, a police officer has considered it standard protocol to "know the identity and character of as many persons in his district or beat as possible."

Adams, *supra*, at 26. Patrol officers are routinely advised during daily briefings of the name and description of potentially dangerous individuals they may encounter. But identification by sight recognition is an obviously limited tool; in particular, officers in metropolitan areas with large, transient populations cannot hope to recognize each and every dangerous detainee they encounter. And inferences drawn merely from non-factual cues, such as race, are obviously abhorrent.

Law enforcement agencies have long been refining the technological tools that can equip officers with potentially life-saving information about their detainees. As early as 1963, officers were advised that "[i]f the radio or a telephone is available, check with Records for the subject's record." Adams, *supra*, at 29. Today, law enforcement authorities have made sure that availability need not be an issue. Field officers can quickly (i.e. within the brief period of detention allowed by a *Terry* stop) use their own computers, or radio to their dispatcher, to access "comprehensive criminal history records" (known colloquially as "rap sheets"). These records reflect the subject's "current and past involvement with the criminal justice system * * * including arrests," the leading indicators of a propensity to assault police officers. *Use and Management of Criminal History Record Information*, *supra*, at 29. In some jurisdictions, police officers can now gain almost instantaneous access to such records by entering a detainee's name directly; the Los Angeles County Consolidated Criminal History Reporting System can retrieve information in less than 2.5 seconds. *Id.* at 66. "The majority of criminal justice inquiries to State repositories for criminal history record information are received on-line from remote computer terminals. * * * The remote terminal may be physically located in a police department [or, in] a growing number of jurisdictions, remote terminals have been installed in

individual police cars, giving police officers access to criminal history records in the field." *Id.* at 37. "Via [patrol car] computer, officers in the field have lightning-fast access to booking photos, arrest reports and other types of vital information that will allow them to determine if they're headed into a dangerous situation." Amy C. Rippel, *Laptops in Cop Cars*, ORLANDO SENTINEL, Jan. 9, 2003, at J1. The modern trend is toward "[p]ortable computers in patrol cars [that] enhance officer safety by giving them an information edge." The Evolution and Development of Police Technology: Technical Report for the National Institute of Justice 75 (July 1, 1998). This Court has acknowledged the fact that computer-equipped patrol cars conduct instantaneous searches of criminal history using only detainee names. *Arizona* v. *Evans*, 514 U.S. 1, 3 (1995) (noting that respondent was arrested when his name was entered into the patrol car computer after a traffic stop).[2]

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[2] The specter of inaccurate, unduly "intimate" data searches raised by amicus Electronic Privacy Information Center is without foundation. (EPIC Br. at 3). First, officials charged with maintaining computerized criminal history repositories are constrained by regulation and custom from including "investigative information" and "intelligence information" in their databases. U.S. Department of Justice, Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update* (2001) at 29. Moreover, the rudimentary "name-only" searches available to police officers during a fleeting *Terry* stop will generally yield only the existence of prior convictions and arrests; more comprehensive data may take longer to generate. *Id.* at 24 (observing that the time frames for various types of searches may vary depending on the information and verification level required). Moreover, consistent with concerns expressed in *Evans*, 514 U.S. at 16-17 (O'Connor, J., concurring), law enforcement officers nationwide are striving to ensure the accuracy of their electronic criminal history information. See *Use and Management of Criminal History Record Information*, *supra*, at 50. For example, 35 states require their central information repository to conduct data quality audits in order to guard against the dissemination of inaccurate information. *Ibid.* Finally, "[e]ach state permits subjects to review their records and to institute procedures to correct errors." *Id.* at 48.

One "common denominator" found among victim officers is that they "did not perceive their attacker to be a serious threat until it was too late." Thomas D. Petrowski, *Use-of-Force Policies and Training*, F.B.I. LAW ENFORCEMENT BULLETIN, Oct. 1, 2002, at 25. Police officers who learn a detainee's name can literally forearm themselves with this information, altering their behavior toward the detainee if, say, the answer to their question is "John Dillinger" as opposed to "Dr. Billy Graham." Once made aware of an elevated threat, officers can elect where to stand in relation to the detainee in order to maximize their safety. See, *e.g.*, Charles Remsberg, THE TACTICAL EDGE 277-280 (1986) (diagramming the location of the "target zone," "crisis zone," "reach zone," and "point reflex zone" for officers conducting vehicle stops) (diagram attached hereto as Appendix, *infra*). They can decide whether to call for backup. *Id.* at 316. Officers who recognize that they are engaged in high-risk confrontations may elect to forego approaching the detainee or his vehicle in favor of ordering the detainee to walk towards the police car while shining a high-intensity light in his eyes to thwart possible attack. *Ibid.* In some circumstances, the officer might even choose to break off the encounter until safer circumstances arise.

The profound tactical advantage held by those who know the identity of their detainees is illustrated by the admission of one officer interviewed for an FBI probe into police killings. U.S. Department of Justice, Federal Bureau of Investigation, *In the Line of Fire: Violence Against Law Enforcement* 37 (1997). The officer was "surprised" to be assaulted during a routine traffic stop, but admitted that he had failed to radio to his dispatcher for information about the driver or his car. *Ibid.* Had he done so, he would have

learned that the car was stolen, and reports that he would "not [have] treated the offender in such a casual manner." *Ibid.* In short, knowledge of a detainee's history empowers police officers to protect their own lives during the course of a *Terry* stop while serving the public. The Nevada statute is a deft, minimally intrusive tool that enables police officers to make the right split-second tactical decisions when conducting constitutionally permissible field investigations.

II. THE NEVADA STATUTE FURTHERS AN ACKNOWLEDGED STATE INTEREST IN POLICE SAFETY WITHOUT UNDULY ENCROACHING ON DETAINEES' FOURTH AMENDMENT PRIVACY INTERESTS

A. *Nevada's Statute Is A Logical Outgrowth of the Authority Given to Police Officers in Terry.*

This Court recognized in *Terry* that police officers are entitled – indeed, obliged – to stop a citizen on the street if they suspect him of criminal behavior. 392 U.S. at 23. The Nevada statute codifies the *Terry* standard, authorizing an officer to demand a detainee's identity only if he has reasonable suspicion of criminal activity. The right to so intrude upon the freedom of movement and security of private citizens based on less than probable cause stems from the vital government interest in "effective crime prevention and detection." *Id.* at 22. Separate and apart from the intrusion justified by that generalized government interest, once a *Terry* stop begins, a "more immediate interest" is triggered; that "of the police officer in taking steps to assure himself" that the detainee poses no threat to him. *Id.* at 23.

This officer-safety interest justifies actions distinct from the investigatory stop itself. Even three decades ago, the Court recognized that "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are

killed in the line of duty, and thousands more are wounded." *Terry*, 392 U.S. at 23. Acknowledging this grim reality, the Court approved one step to determine whether a detainee posed a threat – the pat-down frisk. Nevertheless, although the Court in *Terry* was specifically asked to approve only that specific measure, a broader interest in protective measures was recognized. "In view of [the perils to officers engaged in *Terry* stops], we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest," the Court concluded. *Id.* at 24; see also *id.* at 34 (Harlan, J., concurring) ("Once [a *Terry* stop is] justified * * * the officer's right to take *suitable measures* for his own safety follow[s] automatically") (emphasis added).

The Court has often recognized the importance of measures designed to enhance officer safety during field investigations. In *Adams* v. *Williams*, 407 U.S. 143, 146 (1972), the Court upheld an officer's right to reach through an open car door window and seize a revolver held by a detainee, based only upon an informant's tip that the detainee was armed. "[T]he policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect," the Court observed. The authority to search and seize was justified, even in the absence of a warrant or probable cause, not because the officer wished to probe for evidence of a crime, "but to allow the officer to pursue his investigation without fear of violence." *Ibid.*

In short, this Court has for more than a quarter century acknowleged that, once the general government interest in crime prevention justifies the minimally intrusive measure of a *Terry* stop, a more urgent and specific government interest in officer safety permits additional, and more intrusive, actions

with regard to the detainee. The grim figures in the 2002 FBI *Law Enforcement Officers Killed and Assaulted* report illustrates that officers continue to be at risk today even though the protective measures authorized by *Terry* and *Adams* are available. Those cases authorized physical contact with the detainee to assess or foreclose the threat of an assault at a point in history when physical contact was virtually the only means of protecting officer safety.

The balancing of interests should reach the same result when officers seek to protect themselves with information, especially now that a mere name can generate critical information at lightning speed. The authority to require a person to identify himself is restricted under the Nevada statute to situations in which *Terry*'s reasonable suspicion test has been met, *i.e.*, situations where sufficient cause has been established to permit an officer to take a number of investigative actions. Enabled by such reasonable suspicions, officers will often need only obtain the name of a detainee in order to obtain access to a rap sheet reflecting past arrests and convictions – two key predictors of officer assault. Officers who know they are dealing with past arrestees can then take specific protective actions, such as calling for backup, moving to a less vulnerable position in relation to the detainee, shining a disabling light on the detainee, and keeping the gun-wielding hand free during questioning, in order to maximize their safety. Remsberg, *supra*, at 277-280, 316. If the state interest in police safety outweighed the detainee's right to be free of body-skimming pat-downs in *Terry* and the right to be let alone within the physical confines of one's car in *Adams*, surely it outweighs his interest in refusing to state his name to an officer.

In sum, the Nevada statute helps officers who initiate *Terry* stops to determine the threat posed by their detainee without touching them or reaching into

their personal space. Therefore, it is far less intrusive upon a citizen's right to be free from unreasonable searches and seizures than measures the Court has already held to be constitutionally permissible for the protection of our Nation's law enforcement officers.

B. *The Possibility That Officers Who Identify Detainees May Uncover Investigative Leads Is No Reason To Deprive Officers Of A Critical Safety Tool.*

Petitioner erroneously posits that the sole purpose of the Nevada statute is to unearth information for subsequent use in a criminal investigation. Pet. Br. at 20 ("the police would have little interest in asking persons their names or identities [unless the identity] lead[s] to incriminating evidence"). The Court should reject this crabbed perspective. In fact, the Nevada identification statute serves the two symbiotic purposes recognized in *Terry* – officer safety and crime investigation. As illustrated in Part II.A above, the Nevada statute is a minimally intrusive tool that goes a long way to achieving *Terry's* officer safety goal and is therefore a reasonable measure in the Fourth Amendment rubric. The possibility that the statute may also serve the second *Terry* goal, crime investigation, is a justification for its existence, not a flaw requiring its invalidation, as explained in Respondents' brief.

Terry stops are constitutionally permissible in large part because they are a useful investigative tool for police officers. "It may be the essence of good police work to adopt an intermediate response [when observing potentially criminal behavior]. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams*, 407 U.S. at 145-146 (citation omitted); see also *United States* v. *Brignoni-Ponce*, 422

U.S. 873, 881 (1975) (citing *Adams*, and concluding that officers who reasonably suspect drivers near the United States border of immigration violations may stop them and inquire into their citizenship and immigration status). One goal of *Terry* stops is to "prevent[] crime," *ibid.*, and police officers conducting them may find a clue in the detainee's name. The Court has repeatedly held that measures which simultaneously protect police officers and produce investigatory byproducts are not necessarily unconstitutional. In any event, it is highly unlikely that a detainee's name will generate useful investigatory leads in most cases.

1. Legitimate Officer Safety Measures Cannot Be Invalidated Merely Because they May Incidentally Unearth Evidence Relevant to Crime Prevention.

The Court has often concluded that legitimate officer safety measures like the Nevada statute do not become constitutionally offensive merely because they are capable of yielding investigative fruit. For instance, in *Colorado* v. *Bertine*, 479 U.S. 367 (1987), the Court affirmed a conviction based in part on evidence obtained during an inventory search of an arrestee's van. The officers in that case followed local police procedure requiring a detailed inspection of all impounded vehicles, and unearthed illegal drugs and cash used to prove several drug offenses, going well beyond the DUI charge for which the defendant was originally arrested. *Id.* at 369. The Court observed that the police department had established its inventory policy to achieve three goals, one of which was "protection of the police from dangerous instrumentalities," such as explosives or weapons the likes of which had been found in impounded cars in the past. *Id.* at 370. The Court concluded that the inventory search was conducted in accordance with that established policy, and was not conducted in bad

faith or "for the sole purpose of investigation." *Id.* at 372. Therefore, the legitimate governmental interests it served outweighed the individual's Fourth Amendment interests in the privacy of his car and its contents, even though the search led to admissible evidence. *Id.* at 374.

It is widely accepted that police officers conducting investigative detentions may seize, and prosecutors may use at trial, evidence found during the detention and frisk – even if the evidence supports a charge unrelated to the original justification for the stop. Indeed, in *Terry* itself, the detainee was stopped because the police officer suspected that he was preparing to commit a stick-up; the gun uncovered during the officer's lawful pat-down was later admitted into evidence to prove a concealed weapons charge. 392 U.S. at 6-7, 30-31. This Court concluded that because pat-down searches during a *Terry* detention were reasonable under the Fourth Amendment, "any weapons seized may properly be introduced in evidence against the person from whom they were taken." *Id.* at 31. The principle has been applied repeatedly. See, *e.g.*, *Illinois* v. *Wardlow*, 528 U.S. 119 (2000) (permitting introduction into evidence of gun seized during *Terry* stop justified by suspected drug trafficking); *United States* v. *Hensley*, 469 U.S. 221 (1985) (permitting introduction into evidence of gun seized during *Terry* stop justified by suspected bank robbery). And it has not been limited to weapons seized during detention. See, *e.g.*, *Minnesota* v. *Dickerson*, 508 U.S. 366 (1993) (permitting seizure and introduction into evidence of drugs uncovered during a lawful *Terry* pat-down); *Michigan* v. *Long*, 463 U.S. 1032 (1983) (permitting introduction into evidence of drugs found when officers conducting *Terry* stop to investigate car in ditch searched passenger compartment for weapons and obtained a plain view of drugs). Implicit in these cases is that investigative measures – whether authorized by statute or by judges

– that further the government interest in police officer safety are not constitutionally suspect merely because the discovery of other criminal conduct is a byproduct of their use, so long as proper cause is present. [3]

This principle applies squarely to the statute at issue herein. Nevada lawmakers concerned with the risks attendant to police field work sought to enable officers to protect themselves by determining the identity of those they confronted during *Terry* stops. In setting forth specific and cabined procedures permitting officers to do so, the Nevada legislature sought to bring regularity and uniformity to police field interviews, advancing the goal of officer safety while curtailing the prospect of overzealous *Terry* questioning. The legislature thus permitted officers to exercise the authority to require a person to provide his or her name only as part of an investigation founded on reasonable suspicion, essentially codifying the *Terry* standard. It also specified the single question that detainees must answer, and prescribed the precise penalty for refusal to cooperate. In addition, however, the statute places a strict 60-minute limit on the duration of *Terry* stops and bars officers from moving detainees without arresting them, Nev. Rev. Stat. 171.123(4). Most important, the statute expressly prohibits officers from seeking to compel detainees to divulge anything other than their identities. Nev. Rev. Stat. 171.123(3). In essence, this provision codifies the caution in *Berkemer* v. *McCarty*, 468 U.S. 420, 439-440 (1984) that detainees are "not obliged to respond" to officer questions "try[ing] to

[3] Indeed, the Court has repeatedly refused to bar the use of evidence discovered even as a result of genuinely pretextual investigative measures, so long as proper cause for those measures was present. See, *e.g.*, *Arkansas* v. *Sullivan*, 532 U.S. 769, 771-772 (2001) (*per curiam*); *Whren* v. *United States*, 517 U.S. 806, 813 (1996).

obtain information confirming or dispelling * * * suspicions."[4]

That the Nevada legislature was driven by the goal of officer safety is suggested by the manner in which the statute functions. Rather than simply creating an independent and free-standing rule, the Nevada legislature's restrictions on *Terry* stops function within the broader framework of prohibitions on interfering with or endangering police officers. Arrests or convictions for failing to comply with Nevada's identification statute will generally be premised on Nev. Rev. Stat. 199.280, which provides that any person who "willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished." The foremost goal of Nev. Rev. Stat. 199.280 is to ensure that officers can perform their duties without fear of interference from combative or fleeing detainees. It provides for detainee punishment only as a means of ensuring officer safety, not as an investigative tool.

In short, the Nevada statute was narrowly crafted to serve the legitimate goal of protecting officers thrown into unpredictable situations on a daily basis while respecting the rights of citizen detainees. When the statute is enforced, police officers might from time to time come across information useful to the investigation of a possible crime. But this incidental

[4] Petitioner makes much of the Court's remark in *Berkemer* v. *McCarty*, 468 U.S. 420, 439-440 (1984), that police may not force citizens to participate in investigatory interviews. But *Berkemer*'s subtle language does not support the argument that detainees are immune from disclosing their identification. *Berkemer* authorizes two types of inquiries: those that "*determine* [detainee] identity" and those that "*try* to obtain information confirming or dispelling the officer's suspicions." *Ibid.* (emphasis added). This language suggests that police are entitled to know a detainee's identity but may learn additional information only if citizens voluntarily cooperate. It further suggests that the two inquiries are analytically distinct and carry independent weight.

effect is not the sole, or even the primary, purpose of the statute. Notably, pat-down frisks authorized under *Terry* often yield evidence of criminal activity independent of the basis for the stop, such as possession of illegal weapons or drugs. The Court in *Terry* did not see fit to expose police officers to possible assault in order to foreclose the possibility that pat-down searches would reveal potentially useful information. There is no more reason to do so in this case. If bodily and automobile inventory searches, which are far more invasive than the request for identification authorized by the Nevada statute, survive constitutional scrutiny, the Nevada statute cannot be said to unreasonably trespass upon individuals' Fourth Amendment rights.

2. Names are Not Ordinarily a Matter of Evidentiary Significance in Criminal Prosecutions.

As discussed above, the Court has affirmed convictions based upon physical evidence, such as drugs, cash, and stolen vehicles, uncovered during safety-driven measures. By contrast, it is highly unlikely that the safety-driven measure at issue in this case, required detainee identification, will often yield evidence admissible in a criminal trial. Therefore, the asserted invasion effected by the Nevada statute is inherently more reasonable even than practices the Court has already deemed constitutional.

Requiring detainees to identify themselves will hardly be as revealing as Petitioner suggests. Even the additional information an officer can retrieve using the name – the fact of prior arrests or outstanding warrants – is innocuous compared with the conclusive physical evidence this Court permits officers to uncover without a warrant when officer safety is at stake. As illustrated in Part I above, the criminal history records accessible during *Terry* stops are primarily lists of past arrests, convictions, and

outstanding warrants. The databases available to officers generally do not – and in some cases, by regulation, cannot – contain "investigative information" or "intelligence information." *Use and Management of Criminal History Record Information, supra*, at 29. To be sure, officers who access rap sheets may learn that a detainee is wanted on a warrant or that a detainee carrying a weapon is legally barred from doing so. This information may then independently influence an officer's decision to arrest a detainee – an intermediate step in the criminal justice system which may or may not lead to conviction. But a person's name, as distinct from their identity, is rarely an issue in a criminal case. Accordingly the Court need not depart from its settled course of approving officer safety measures in this case, where the citizen interest on the other side of the scale is so speculative.

III. THE FIFTH AMENDMENT DOES NOT SHIELD DETAINEES FROM IDENTIFYING THEMSELVES TO POLICE OFFICERS.

A. *Required Self-Identification During a Terry Stop Does Not Trigger Fifth Amendment Protections.*

The Fifth Amendment privilege against self-incrimination is applicable only in a narrow set of circumstances far removed from the facts of this case. Individuals can only assert the privilege against compelled testimonial or communicative statements that are incriminating, not against measures designed to identify them in the course of legal proceedings. Moreover, individuals can only assert the privilege to prevent the use of relevant statements in a criminal case. *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003). Because the Nevada statute is designed to elicit identity only, for use during the field stop itself, it does not trigger the protections of the Fifth Amendment.

1. The Fifth Amendment Applies To Communications, Not To The Provision of Identification Evidence.

The core purpose of the Fifth Amendment privilege is to "spare the accused from having to reveal * * * his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government." *Doe* v. *United States*, 487 U.S. 201, 213 (1988). Accordingly, where law enforcement officers compel suspects to provide mere identifying information that does not intrude into "a private inner sanctum of individual feeling and thought," *Couch* v. *United States*, 409 U.S. 322, 327 (1973), the Court has given its approval.

The Court has on many occasions approved measures that compelled persons to provide evidence of their identity. The rule set forth in *Schmerber* v. *California*, 384 U.S. 757, 764 (1966) holds today: law enforcement officers seeking to learn a suspect's identity may compel them to provide "real or physical evidence" against themselves. Applying the *Schmerber* rule, this Court has found a battery of identification measures that elicit "real or physical evidence" to be beyond the purview of the Fifth Amendment. In one highly analogous instance the Court upheld a California statute compelling drivers involved in car accidents not merely to provide their names and addresses, but to stop at the scene of the accident to do so. *California* v. *Byers*, 402 U.S. 424, 433-434 (1971). The disclosure of name and address was held by a plurality of this Court to be "an essentially neutral act," not "testimonial in the Fifth Amendment sense." *Id.* at 431-432. The nontestimonial nature of the information compelled by the statute was sufficient to insulate it from Fifth Amendment scrutiny, whether or not the identification provided could be defined as incriminating.

Following the same reasoning, the Court has allowed police to obtain similarly "neutral" identifying evidence from suspects in several ways, some of which even involve compelled speech. They may extract blood samples from suspects and analyze their chemical composition. *Schmerber*, 384 U.S. at 765. Police may require suspects to submit handwriting exemplars where the purpose of the written material is to identify the suspect as the author of a previously existing piece of evidence, not to use the content of the exemplar as proof of a crime. *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967).[5] Nor is the spoken word an impassable boundary. Officers may force a defendant to appear in a lineup and recite particular words to determine whether witnesses may identify his voice. *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967). And they may compel suspects' voice exemplars for comparison with wiretap tapes to determine the identity of the taped speakers. *United States* v. *Dionisio*, 410 U.S. 1, 6-7 (1973). In each of these cases, police had evidence that a crime had already been committed, and the Court allowed them to force suspects to provide evidence identifying them as the perpetrator.

The Nevada statute is simply another entry in this familiar and approved arsenal of compelled identification evidence. Indeed, it is virtually indistinguishable from the identification requirement held to be non-testimonial in *Byers*. The statute permits law enforcement officers to determine the name of detainees, just as the voice exemplar in *Dionisio*, the compelled recitation in *Wade*, and the handwriting sample in *Gilbert* permitted officers to determine the identity of those under investigation.

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[5] Similarly, the Court has held that compelled handwriting exemplars do not violate the Fourth Amendment, so long as a preliminary showing of reasonableness is made. *United States* v. *Mara*, 410 U.S. 19, 22 (1973).

Accordingly it does not intrude on Fifth Amendment rights.

2. A Bare Name Is Not Incriminating Evidence Subject to the Protections of the Fifth Amendment.

Byers establishes that even if a name yields evidence against the detainee, its compelled provision is permissible under the Fifth Amendment. The Court acknowledged that providing a name following a traffic accident could lead to prosecution for an offense unrelated to the accident. 402 U.S. at 432. "Although identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence." *Id.* at 434. "There is no constitutional right to * * * [evade an identification statute] in order to avoid the possibility of legal involvement." *Ibid.* Just as in *Byers*, a *Terry* detainee who provides his name faces the possibility that a prompt search of police records will result in an arrest or charge for an offense unrelated to the original justification for the stop. That possibility is insufficient to trigger Fifth Amendment protection.

In short, a name-generated rap sheet is far less directly incriminating, in and of itself, than measures such as the line-up identification that resulted from the compelled speech in *Wade*, the blood test in *Schmerber*, or the wiretap identification that resulted from the compelled voice exemplar in *Dionisio*. In each of those cases, the procedure compelled the production of substantive evidence that was a critical evidentiary link between the crime and the defendant. The information gleaned from the Nevada statute, by contrast, may ensnare a detainee already wanted by police for criminal wrongdoing, but it will not itself provide evidence and will only result in the obtaining of proof as a consequence of "different factors and independent evidence," *Byers*, 402 U.S. at 434. The

Court made it clear in *Byers* that statutes requiring only the "neutral" act of self-identification are not rendered unconstitutional simply because identification may lead to "collateral consequences." *Id.* at 432.

As a practical matter, the circumstances in which a person's mere name, as distinct from his or her identity, will itself be evidence of criminal behavior are actually few and far between. The crime of identity theft may conceivably turn on the *use* of a particular name, but not on any fact other than that the perpetrator is not really the person whose name was used. Similarly, forms of fraud involving impersonation may turn on one's *identity* being different from a false identity used in the fraudulent scheme, but the person's *actual* name will make no difference. Even domestic battery, the offense under investigation during the *Terry* stop in the instant case, cannot be proven on the basis of a name. Those who share the same name, whether by coincidence or in-law relationship, may not be involved in the type of relationship covered by the domestic violence laws, while those with different last names, such as stepparents, live-in partners, or even married persons who do not choose to take each others' names, may participate in intimate relationships with the alleged victims of their domestic abuse.

B. *The Fifth Amendment Privilege Is Not Absolute, and May Give Way In Circumstances Such as Those Implicated by the Nevada Statute.*

The Fifth Amendment protection against self-incrimination is far from absolute; it must yield to some of the logistical imperatives of routine police work. This Court has long recognized that law enforcement officers must elicit some limited, neutral information from detainees and suspects in order to fulfill basic functions. Thus, for example, police are entitled to secure routine biographical information

during the booking process in order to keep accurate records, because that information has been deemed "reasonably related to the police's administrative concerns." *Pennsylvania* v. *Muniz*, 496 U.S. 582, 601-602 (1990). Similarly, officers are entitled to request identification from traffic offenders, even though that request may compel offenders to reveal information that independently leads to other charges. See, *e.g.*, *Byers*, 402 U.S. at 434.

Notably, just one Term ago, the Court declined to define a "criminal case" as commencing with police interrogations at the outset of the investigatory process. *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003). Thus, police questioning that does not result in the initiation of legal proceedings need not withstand Fifth Amendment scrutiny. Even if police questioning leads to the initiation of criminal proceedings, the responses to those questions are not subject to the Fifth Amendment if they are not used in court. *Id.* at 2000-2001. Of course, the majority of *Terry* detainees who give their names will never be arrested, never be charged with a crime, and never be prosecuted in a criminal case. In the lion's share of these cases, therefore, the Fifth Amendment will never come into play. Even those detainees who are arrested on the basis of information learned via a computerized name search will have revealed no more than what is constitutionally permissible at the booking stage. It is hard to see how the same information divulged when criminal charges are imminent is subject to a lesser Fifth Amendment standard than information divulged when criminal charges are inchoate

The Nevada statute permits officers to request just the type of identifying information the Court has already held to be immune from the Fifth Amendment when reasonably designed to further a legitimate law enforcement goal. The authority, and even duty, of an officer to conduct a *Terry* stop, and investigation, 392

U.S. at 23, is a necessary and proper part of a police officer's duties, and ensuring that it is conducted safely represents a legitimate law enforcement need independent of any desire to gather evidence. The provision of identification during a *Terry* stop, like the provision of detailed biographical information during the booking process, serves a critical law enforcement need. It does so without requiring detainees to forfeit their private thoughts, motives, or beliefs in contravention of the Fifth Amendment.

IV. THE NEVADA STATUTE POSES NO THREAT TO FREE SPEECH INTERESTS PROTECTED BY THE FIRST AMENDMENT.

Petitioner misses the mark in asserting that the Nevada identification statute treads on First Amendment interests in anonymous speech. Pet. Br. at 37-39. The Court has explicitly stated that a speaker's interest in anonymity is strongest when the speaker is engaged in "one-on-one communication" with his intended listener. *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 199 (1999). This interest in anonymity was sufficient to invalidate a statute requiring petition circulators from wearing name badges while soliciting signatures during the type of door-to-door outings alluded to by Petitioner. *Id.* at 200. In contrast, a provision of the statute requiring circulators to reveal their identities in affidavits submitted to government agencies after the solicitation was concluded, which were not instantly accessible to potential listeners, was suggested to be inoffensive to free speech. *Id.* at 198-199. The statute invalidated in *Watchtower Bible & Tract Society of New York, Inc.* v. *Village of Stratton*. 536 U.S. 150, 166-167 (2002), was arguably less respectful of speakers' anonymity than the *Buckley* statute in part because it required speakers to register as door-to-door canvassers on a list available to the public at large, prior to contacting listeners.

Petitioner's reliance on First Amendment principles misses their point. The Court in those cases sought to prevent measures that would deter or discourage free speech, not to protect the identities of speakers identities from any legitimate disclosure. That principle has no relevance to this case, which involves a statute that requires providing one's name to a police officer conducting a criminal investigation supported by reasonable suspicion. Those cases protect the speaker's anonymity from his potential audience, not from proper regulatory authorities such as police departments. Because the Nevada statute does not force individuals exercising their First Amendment rights to divulge their identity to substantive listeners or threaten to silence them from expressing their views, it does not offend any of the First Amendment rights recognized in *Watchtower*, as Petitioner urges.

CONCLUSION

For the foregoing reasons, as well as those set forth in Respondent's brief, the Court should affirm the judgment of the Nevada Supreme Court.

Respectfully submitted.

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JANUARY 2004

APPENDIX

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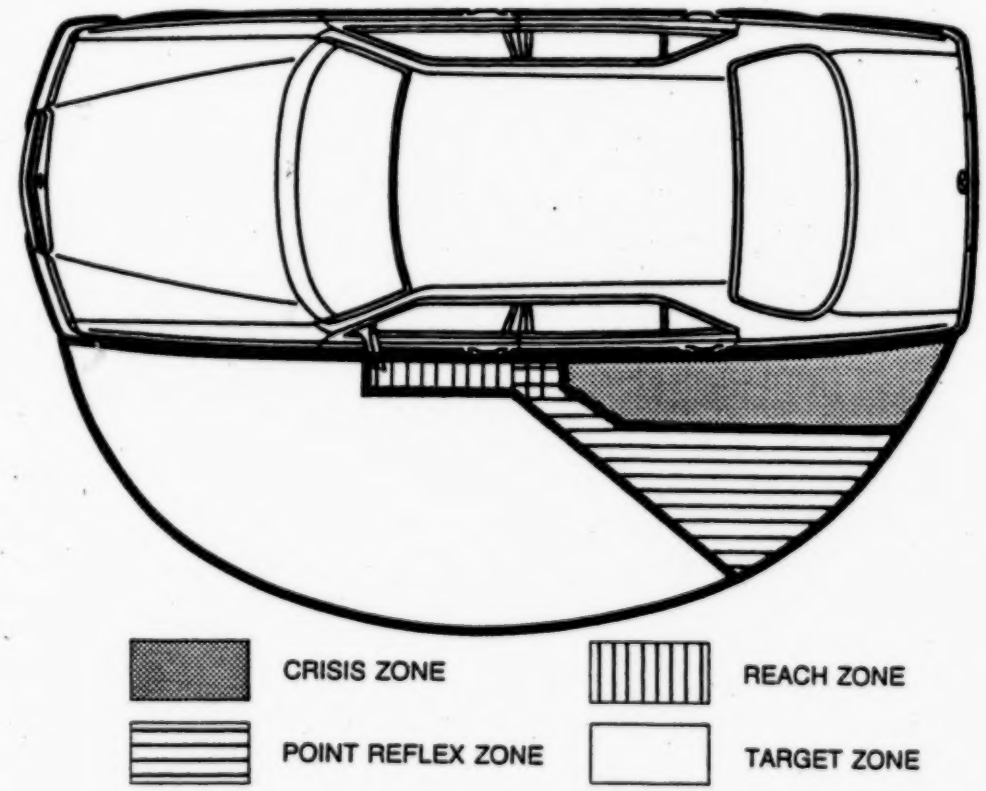

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No. 03-5554

In the Supreme Court of the United States

LARRY D. HIIBEL, PETITIONER

v.

SIXTH JUDICIAL DISTRICT COURT OF NEVADA, HUMBOLDT COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether a person stopped for an investigative detention based on reasonable suspicion may be required, consistent with the Fourth Amendment, to identify himself.

2. Whether requiring the subject of an investigative detention to identify himself infringes the Fifth Amendment privilege against compelled self-incrimination.

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SIXTH JUDICIAL DISTRICT COURT OF NEVADA, HUMBOLDT COUNTY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the issue whether a state statute that requires a person stopped for an investigative detention to identify himself violates either the Fourth or Fifth Amendments. The Court's resolution of that issue will have significant implications for the conduct of investigative detentions by federal law enforcement officers. The United States therefore has a substantial interest in the Court's disposition of this case.

STATEMENT

1. On the evening of May 21, 2000, Humboldt County, Nevada Sheriff's Deputy Lee Dove received a report that a witness had seen an individual striking a female passenger inside a pickup truck. Dove drove to the location of the incident and spoke to the witness, and the witness directed him to a truck that was parked nearby. When Dove approached the truck, he observed skid marks in the gravel, suggesting that the truck had been pulled over in an aggressive manner. Petitioner was standing outside the truck and

his minor daughter was seated inside. Based on petitioner's mannerisms, speech, eyes, and odor, Dove believed that petitioner was intoxicated. J.A. 9-10.

Deputy Dove told petitioner that he had received a report that petitioner had been fighting with the passenger, and Dove asked petitioner to identify himself. Petitioner refused, instead placing his hands behind his back and challenging Dove to take him to jail. Dove continued to ask petitioner for identification, and petitioner continued to refuse. Petitioner stated that he had done nothing wrong, and he continued to place his hands behind his back and to ask Dove to take him to jail. After eleven unsuccessful attempts to determine petitioner's identity, and after warning petitioner that his failure to provide his identity would result in his arrest, Dove handcuffed petitioner and placed him under arrest. J.A. 4, 10, 15-16.

Petitioner was charged with resisting a public officer in violation of Nevada Revised Statutes (NRS) § 199.280 (2000), which makes it a crime to "willfully resist[], delay[] or obstruct[] a public officer in discharging or attempting to discharge any legal duty of his office."[1] Petitioner was convicted on that charge after a trial before a justice of the peace.

2. Deputy Dove demanded that petitioner identify himself under the authority of NRS § 171.123, which provides:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
>
> * * * * *
>
> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.

[1] When, as in this case, no dangerous weapon is used, the offense is a misdemeanor. NRS § 199.280(2). Petitioner was also charged with misdemeanor domestic battery, but that charge was dismissed before trial at the State's request. J.A. 16 n.1.

At the conclusion of his trial, petitioner moved for dismissal of the charge on the ground that the identification requirement of Section 171.123(3) violates the Fourth Amendment. The justice of the peace denied the motion. J.A. 5-6.

3. Petitioner appealed to the Sixth Judicial District Court of Nevada, contending that the identification requirement was unconstitutional under the Fourth Amendment and the Self-Incrimination Clause of the Fifth Amendment. The district court first concluded that the evidence was sufficient to sustain petitioner's conviction. J.A. 11. The court then addressed petitioner's Fifth Amendment claim, balancing the "public interest" served by the identification requirement against "an individual's constitutional right to remain silent." *Ibid.* The court determined that the balance weighed in favor of the identification requirement, observing that, "with both domestic battery and DUI the identity of the suspect may be crucial to determine not only for the officer's safety but also for the protection of possible victims." J.A. 12. The district court did not separately discuss petitioner's Fourth Amendment claim.

4. The Supreme Court of Nevada affirmed. J.A. 14-34.[2] The court explained that, in determining whether the identification requirement is reasonable under the Fourth Amendment, it would balance "the public interest and the individual's right to personal security free from arbitrary interference." J.A. 19 (quoting *Brown* v. *Texas*, 443 U.S. 47, 50

[2] The court's opinion only addresses respondent's Fourth Amendment claim.

(1979)). As to the first of those considerations, the court found an "overwhelming" public interest in requiring individuals detained on reasonable suspicion to identify themselves. *Ibid.*

The court explained initially that the identification requirement enhances the safety of law enforcement officers. The court observed that the "most dangerous time for an officer may be during an investigative stop—when a suspect is approached and questioned." J.A. 20. After reviewing statistics indicating that many officers are killed while attempting to effect a stop or arrest and that the suspects in those killings frequently have a criminal record, the court stated: "Knowing the identity of a suspect allows officers to more accurately evaluate and predict potential dangers that may arise during an investigative stop." *Ibid.*

The court next found that the identification requirement furthers the government's interest in effective crime prevention. For instance, the court observed, identification might reveal that an individual loitering in the vicinity of a daycare center is a registered sex offender, or that a person stopped for suspicious conduct is the subject of a restraining order or is a "wanted terrorist or sniper." J.A. 21-22. In those situations, the court reasoned, the identification requirement helps an officer to determine whether the suspect is engaged in crime. J.A. 21.

As for the other side of the balance, the court concluded that the identification requirement "involve[s] a minimal invasion of personal privacy." J.A. 22. In the court's view, "[r]easonable people do not expect their identities—their names to be withheld from officers" because "we reveal our names in a variety of situations every day without much consideration." J.A. 23. The court found it "untenable" to "hold that a name, which is neutral and non-incriminating information, is somehow an invasion of privacy." *Ibid.* The court thus held that "[r]equiring a person reasonably suspected of

committing a crime to identify himself or herself to law enforcement officers during a brief, investigatory stop is a commonsense requirement necessary to protect both the public and law enforcement officers." J.A. 23-24.[3]

5. Petitioner sought rehearing, asking the court to address his Fifth Amendment claim. Pet. App. I. The court denied rehearing. J.A. 33-34.

SUMMARY OF ARGUMENT

Requiring the subject of an investigative detention to identify himself infringes neither the Fourth Amendment nor the Fifth Amendment privilege against compelled self-incrimination.

I. The Fourth Amendment affords protection only against those government practices that intrude on a legitimate expectation of privacy. The Court has held that the Fourth Amendment affords no basis for declining to provide a voice or handwriting exemplar, reasoning that a person has no legitimate expectation of privacy in his voice or handwriting. Because a person's name, like his voice or handwriting, is revealed in a variety of everyday interactions, there is no legitimate expectation of privacy associated with one's identity. Moreover, the Court has made clear that an officer may request the subject of an investigative detention to provide his name. A requirement to comply with such a request entails no additional intrusion on Fourth Amendment interests beyond that inherent in the underlying detention itself.

Even if an identification requirement implicates legitimate expectations of privacy, the requirement is reasonable under the Fourth Amendment: any intrusion on privacy is substantially outweighed by the substantial government

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[3] Three Justices dissented, opining that an individual's interest in preserving anonymity outweighs the public interest in requiring identification. J.A. 26-32.

interests in compelling disclosure. First, knowledge of a person's identity promotes the safety of law enforcement officers and others at the scene of an investigative detention by enabling officers to determine whether the detainee has a criminal record or an outstanding warrant. In addition, such information advances the government interest in effective prevention of crime by giving officers important additional information with which to assess the suspect's conduct and determine the proper course of action. Finally, if a person were released without knowledge of his identity, officers generally would lack the ability to locate him should the need later arise.

II. Requiring the subject of an investigative detention to reveal his identity does not infringe the Fifth Amendment privilege against compelled self-incrimination. When a law requiring individuals to provide information serves government interests other than facilitating a criminal prosecution, and the information sought is inherently neutral and narrowly circumscribed, the balance of considerations dictates that the Fifth Amendment privilege affords no defense for failing to provide the information. In *California* v. *Byers*, 402 U.S. 424 (1971), this Court held that the privilege did not justify noncompliance with a California law requiring persons involved in automobile accidents resulting in property damage to stop and leave their name and address with the property owner. The opinions forming the majority emphasized that the law was not intended to facilitate criminal conviction, and that the identification requirement did not relieve the State's burden to determine through its own independent investigation whether the accident involved criminal conduct.

In this case, likewise, the requirement to provide one's name compels disclosure of inherently neutral information and is intended to serve important interests other than facilitating criminal conviction. A name only reveals identity

and itself provides no information about whether a person is involved in crime. Although learning a person's name can facilitate further investigation, that was equally the case in *Byers*, and the Court there emphasized that any further investigation is a product of officers' own independent efforts. In addition, the government ordinarily could determine a person's name in a variety of alternate ways through further investigation.

The government interests in compelling self-identification include promoting the safety of law enforcement officers and preventing imminent crime, both of which stand apart from the interest in facilitating criminal prosecution. Although the identification requirement comes into play only with respect to persons reasonably suspected of crime, those persons have come to the attention of law enforcement not as the result of any compulsion to make incriminating disclosures, but instead as a consequence of officers' own independent observations.

ARGUMENT

A LAW REQUIRING THE SUBJECT OF AN INVESTIGATIVE DETENTION TO IDENTIFY HIMSELF IS CONSTITUTIONAL

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court held that a police officer may, consistent with the Fourth Amendment, stop and briefly detain for investigation an individual reasonably suspected of criminal activity. See, *e.g.*, *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000). During the detention, the officer may ask the detainee his name and question him concerning matters relevant to the basis for the stop. See, *e.g.*, *Hayes* v. *Florida*, 470 U.S. 811, 816 (1985); *Adams* v. *Williams*, 407 U.S. 143, 146 (1972); *Terry*, 392 U.S. at 28, 30. Requiring a person stopped under *Terry* to identify himself violates neither the Fourth Amendment protection against

unreasonable searches and seizures nor the Fifth Amendment privilege against compelled self-incrimination.

I. THE FOURTH AMENDMENT DOES NOT PROHIBIT REQUIRING THE SUBJECT OF AN INVESTIGATIVE DETENTION TO IDENTIFY HIMSELF

A. Because There Is No Legitimate Expectation Of Privacy In One's Name, An Identification Requirement Does Not Constitute A Search

1. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." A particular government action does not amount to a "search" under the Fourth Amendment unless it invades "a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy.'" *Smith* v. *Maryland*, 442 U.S. 735, 740 (1979); see *Hudson* v. *Palmer*, 468 U.S. 517, 525 (1984); *Katz* v. *United States*, 389 U.S. 347 (1967). It is not enough that an "individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy.'" *Smith*, 442 U.S. at 740 (quoting *Katz*, 389 U.S. at 361). The "individual's subjective expectation of privacy [must be] 'one that society is prepared to recognize as reasonable.'" *Ibid.* (quoting *Katz*, 389 U.S. at 361); see *id.* at 743-744. Requiring a person to identify himself during an investigative stop does not intrude on any legitimate expectation of privacy.

a. This Court's decisions establish that "[w]hat a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection." *California* v. *Greenwood*, 486 U.S. 35, 41 (1988) (quoting *Katz*, 389 U.S. at 351); *California* v. *Ciraolo*, 476 U.S. 207, 213 (1986). Accordingly, a person has no legitimate privacy expectation in trash left in an area "accessible to the public" (*Greenwood*, 486 U.S. at 41); no reasonable expectation that his fenced-in backyard will remain free from inspection by aircraft passing overhead

(*Ciraolo*, 476 U.S. at 215); no legitimate expectation of privacy in his activities in "open fields" that are "accessible to the public," even if the fields are surrounded by a fence or posted with "No Trespassing" signs (*Oliver* v. *United States*, 466 U.S. 170, 179 (1984)); and no reasonable expectation of privacy in his movements from one place to another in an automobile traveling on a "public thoroughfare" (*United States* v. *Knotts*, 460 U.S. 276, 281-285 (1983)).

Of particular relevance, the Court has held that a person has no reasonable expectation of privacy in his voice or handwriting. In *United States* v. *Dionisio*, 410 U.S. 1 (1973), a grand jury witness argued that a subpoena requiring a voice exemplar for identification purposes violated the Fourth Amendment. This Court rejected that claim, holding that a person has no legitimate expectation of privacy in the sound of his voice. *Id.* at 14-15. The Court explained that, "[l]ike a man's facial characteristics, * * * his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world." *Id.* at 14. The Court has reached the same conclusion with respect to handwriting exemplars, observing: "Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice." *United States* v. *Mara*, 410 U.S. 19, 21 (1973).

The principle that a person can claim no Fourth Amendment protection for what he "knowingly exposes to the public" (*Katz*, 389 U.S. at 351) is readily applicable in this case. "Except for the rare recluse who chooses to live his life in complete solitude" (*Dionisio*, 410 U.S. at 14 (internal quotation marks omitted)), a person routinely exposes his identity to the public. Individuals exchange their names as a matter of course in everyday social interactions, an-

regularly display their names when using credit cards or checks in commercial transactions. And a person must reveal his name in order to drive a car, obtain a job, open a bank account, or receive mail. In short, disclosing one's identity is an essential part of everyday life.

A person not only reveals his identity through his own actions, but he also cannot control the sharing of his name by third parties, who remain fully free to disclose his name to anyone including police officers. "This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties," *Smith*, 442 U.S. at 743-744, and "has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities," *id.* at 744 (internal quotation marks omitted). In this case, accordingly, officers could have followed petitioner to his home or workplace and learned his identity from his neighbors or coworkers—an entirely lawful practice that most would consider a more significant invasion of privacy than a mere requirement to provide one's name.

For those reasons, a requirement to state one's name, like a requirement to supply a voice or handwriting exemplar, exposes nothing "that has not previously been exposed to the public at large." *Dionisio*, 410 U.S. at 14 (quoting *United States* v. *Doe (Schwartz)*, 457 F.2d 895, 899 (2d Cir. 1972), cert. denied, 410 U.S. 941 (1973)); see *United States* v. *Ward*, 488 F.2d 162, 164 (9th Cir.) ("The name a person is using, like his voice * * *, is a publicly displayed characteristic."), reversed on other grounds, 488 F.2d 167 (1973). Because the Fourth Amendment affords no grounds for "constructing a wall of privacy" that "does not exist in casual contacts with strangers," *Dionisio*, 410 U.S. at 14 (quoting *Doe*, 457 F.2d at 898-899), compelled identification invades no legitimate privacy interests.

b. An additional reason that a person has no legitimate expectation of privacy in his name is that the name merely serves as a means of identifying him. It provides no other information about the person, let alone information that might reasonably be regarded as private. This Court invoked a similar rationale in *Dionisio*, explaining that a requirement to supply a voice exemplar, like a requirement to supply fingerprints, "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search." 410 U.S. at 15 (quoting *Davis* v. *Mississippi*, 394 U.S. 721, 727 (1969)).

It is true that knowledge of an individual's name, while not itself revealing of any private information, could provide a means for acquiring such information through further investigation. But the possibility that a name could be used to obtain *other* information does not confer a legitimate expectation of privacy in the name itself. Voice and handwriting exemplars likewise can lead to the discovery of private information about a person, yet there is no legitimate expectation of privacy in one's voice or handwriting. The relevant inquiry is whether the particular item sought by law enforcement implicates a legitimate expectation of privacy, not whether that item might facilitate discovery of other information that implicates a cognizable privacy interest.[4]

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[4] If it were otherwise, an individual could assert a legitimate expectation of privacy in a third party's car on the basis that a search of the car might lead to the discovery of private information about him, see *Rakas* v. *Illinois*, 439 U.S. 128 (1978) (holding that passengers have no legitimate expectation of privacy in car belonging to another), or could assert a legitimate expectation of privacy in the phone numbers he dials on the basis that knowledge of the numbers could lead to investigation that discloses the content of a particular conversation, see *Smith*, 442 U.S. at 742-746 (holding that there is no legitimate expectation of privacy in the phone numbers dialed from a private phone).

2. Although an individual has no legitimate expectation of privacy in his name, he does have a cognizable Fourth Amendment interest in moving about free of unreasonable government intrusion. See *Terry*, 392 U.S. at 16-17. The Court held in *Terry*, however, that when officers form a reasonable suspicion of criminal activity, a brief, investigative detention for purposes of questioning the suspect is reasonable under the Fourth Amendment. *Id.* at 20-23. The Court has made clear that the questions put to the subject of a *Terry* stop can include a request for the person's name. See *Hayes*, 470 U.S. at 816; *Adams*, 407 U.S. at 146.

Requiring the individual to respond to an officer's request for his name entails no additional interference with freedom of movement beyond that inherent in the detention itself. It takes no longer to provide a name than to refuse to provide it. A warning that refusal to disclose identity will result in an arrest in fact could shorten the duration of the detention by prompting swifter cooperation. Nor does an identification requirement increase the qualitative severity of the detention. The obligation entails no physical contact with a detainee, and complying by stating one's name should add no anxiety or discomfort beyond what already ensues from the detention and questioning. Requiring a suspect to identify himself in the course of an investigative detention thus neither prolongs nor aggravates the interference with Fourth Amendment interests inherent in the detention itself.

B. An Identification Requirement For Investigative Stops Is Reasonable Under The Fourth Amendment

Even if Nevada's identification requirement for investigative stops intrudes on a legitimate expectation of privacy, the requirement is consistent with the Fourth Amendment. The essential purpose of the Fourth Amendment is "to impose a standard of 'reasonableness' upon the exercise of discretion by government officials * * * in order to

'safeguard the privacy and security of individuals against arbitrary invasions.'" *Delaware* v. *Prouse*, 440 U.S. 648, 653-654 (1979) (quoting *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 312 (1978) and *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967) (footnotes omitted)). The reasonableness of a law enforcement practice is determined "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Prouse*, 440 U.S. at 654; see *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989); *Terry*, 392 U.S. at 21.

With regard to the degree of intrusion on Fourth Amendment interests, to the extent that compelled identification during an investigative detention intrudes on any legitimate expectation of privacy, the intrusion, for the reasons explained, is not significant. On the other side of the balance, the identification requirement serves a number of substantial government interests.

1. First, the identification requirement promotes the ability of law enforcement officers to protect themselves and others in the fluid and potentially volatile circumstances of an investigative stop. This "Court recognized in *Terry* that the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect." *Adams*, 407 U.S. at 146; see *United States* v. *Hensley*, 469 U.S. 221, 235 (1985) (explaining that officers may "take such steps as [are] reasonably necessary to protect their personal safety * * * during the course of [a] stop"). "Knowing the identity of a suspect," as the Nevada Supreme Court explained, "allows officers to more accurately evaluate and predict potential dangers that may arise during an investigative stop." J.A. 20.

Knowledge of a person's identity enables officers to determine whether he has a criminal record. That information is highly useful. Although an officer can conduct a frisk for weapons based on a reasonable fear that a detainee is armed

and dangerous, see *Terry*, 392 U.S. at 30, an officer who lacks information about the detainee's criminal record may not recognize that he presents a danger. Regardless of any frisk, moreover, an officer's awareness that a person has a criminal record could justify special safety precautions —ranging from calling for backup assistance to drawing his weapon and handcuffing the suspect if there is indication that he is especially dangerous.[5] Similarly, an officer who learns that a person is the subject of an outstanding warrant could develop concerns that the person might resort to violence to resist or avoid execution of the warrant. Courts thus have recognized that police officers may, for their safety, request criminal history checks during investigative stops. See, *e.g.*, *United States* v. *Finke*, 85 F.3d 1275, 1279 (7th Cir. 1996); *United States* v. *McRae*, 81 F.3d 1528, 1535-1536 n.6 (10th Cir. 1996). Indeed, given that officers may conduct the "severe" intrusion of a pat-down frisk to assure their own safety and that of the public (*Terry*, 392 U.S. at 24-25), the far lesser intrusion of requiring a detainee to state his name should be permissible for the same purpose.

2. The identification requirement also promotes the government's interests in effective crime prevention and ensuring public safety. See *Terry*, 392 U.S. at 22. Knowing a detainee's criminal history can be significant in assessing a person's conduct and determining the appropriate course of an investigative stop.

As the Nevada Supreme Court explained, for instance, it would be important for an officer to know that an individual observed acting suspiciously in the vicinity of a school playground has a history of sexually abusing minors, or that a detainee observed acting suspiciously near a potential terrorist target is on a terrorist watch list. See J.A. 21. Information of that sort could have a significant effect on the officer's assessment of the proper course of action, and ultimately could allow prevention of an imminent crime or additional harm to victims in an ongoing crime. In addition, even if the officer does not develop probable cause for an arrest, a detainee's knowledge that the officer now knows his name potentially could deter him from following through on any plans to commit a crime.[6]

3. Finally, without knowledge of identity, "subsequent apprehension of [a] released suspect, if he is later shown to have perpetrated the suspected crime or some other offense, will usually be impossible." 4 Wayne R. LaFave, *Search and Seizure* § 9.5(g), at 305 (3d ed. 1996); see *United States* v. *Jones*, 759 F.2d 633, 642 (8th Cir.) ("Limits on the ability of an officer to ascertain the identity of a person would in many instances make investigative stops serve no useful purpose," because "[i]f police during a stop near a crime scene are unable to obtain identification from a suspect, they likely will never be able to relocate the suspect should probable cause later develop."), cert. denied, 474 U.S. 837 (1985). Moreover, officers might subsequently desire to locate an individual detained in an investigative stop not because he remains a suspect, but because he was on the scene as a witness and is a potential source of information. See Model Code of Pre-Arraignment Procedure § 110.2 cmt., at 270 (1975) ("[o]fficer will be confronted with many situations in which it seems necessary to acquire some further information from * * * a

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[5] The courts of appeals have repeatedly held that officers conducting a *Terry* stop may handcuff a suspect and draw their weapons as a safety precaution where such actions are warranted. *E.g.*, *United States* v. *Gil*, 204 F.3d 1347, 1351 (11th Cir.), cert. denied, 531 U.S. 951 (2000); *United States* v. *Vega*, 72 F.3d 507, 515 (7th Cir. 1995), cert. denied, 518 U.S. 1007 (1996); *United States* v. *Edwards*, 53 F.3d 616, 619 (3d Cir. 1995).

[6] Conversely, an officer who learns that a suspect has no criminal record might more readily accept an innocent explanation for suspicious conduct or otherwise limit the scope of the detention.

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person whose name he does not know, and whom, if further action is not taken, he is unlikely to find").

For those reasons, the legitimate government interests served by Nevada's identification requirement for investigative stops substantially outweigh any minimal intrusion on legitimate expectations of privacy. The identification requirement thus is consistent with the Fourth Amendment.[7]

II. REQUIRING THE SUBJECT OF AN INVESTIGATIVE DETENTION TO IDENTIFY HIMSELF DOES NOT INFRINGE THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION

A. The Fifth Amendment Does Not Bar The Government From Requiring Disclosure Of Essentially Neutral Information In Service Of Interests Unrelated To Criminal Prosecution

1. The Self-Incrimination Clause of the Fifth Amendment provides that "[n]o person shall * * * be compelled in any criminal case to be a witness against himself." The core protection afforded by the Clause is that a criminal defendant cannot be compelled to testify against himself in a criminal trial. See *Chavez* v. *Martinez*, 123 S. Ct. 1994, 2000-2001 (2003) (plurality opinion); *id.* at 2006 (Souter, J., concurring). To safeguard that core guarantee, this Court has permitted assertion of the privilege outside of a criminal trial when the information sought could prove incriminating in any eventual prosecution. See *id.* at 2003-2004 (plurality opinion); *United States* v. *Balsys*, 524 U.S. 666, 671 (1998); *Minnesota* v. *Murphy*, 465 U.S. 420, 426 (1984). But the focus remains on the potential for incrimination in a subsequent criminal prosecution. See *Balsys*, 524 U.S. at 671; *Murphy*, 465 U.S. at 426.

The emphasis on the effect in an ultimate criminal prosecution reflects "the fundamental purpose of the Fifth Amendment—the preservation of an adversary system of criminal justice." *Garner* v. *United States*, 424 U.S. 648, 655 (1976). The "adversary system of criminal justice * * * is undermined," this Court has explained, "when a government deliberately seeks to avoid the burdens of independent investigation by compelling self-incriminating disclosures." *Id.* at 655-656; see *Malloy* v. *Hogan*, 378 U.S. 1, 7-8 (1964). Consequently, when the government is engaged in the process of developing its evidentiary case for a criminal prosecution, the Fifth Amendment prevents the government from making its case through the expedient of compelling the defendant to furnish the government with incriminating disclosures.

"In areas where a government cannot be said to be compelling such information, however, there is no such circumvention of the constitutionally mandated policy of adversary criminal proceedings." *Garner*, 424 U.S. at 656. The Fifth Amendment thus affords no basis for refusing to comply with a law requiring individuals to provide information when the requirement serves government interests other than facilitating criminal prosecution and the information sought is narrowly circumscribed and inherently neutral, such that providing it does not relieve the government's "burden[] of independent investigation." *Ibid.*; see *Baltimore City Dep't*

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[7] Petitioner argues (Br. 28-33) that Nevada's identification requirement violates the Fourth Amendment because it permits an officer to arrest a person without probable cause to believe that he committed the crime for which he was initially stopped. The arrest, however, is for a separate crime—failing to identify oneself during an investigative stop—as to which there undoubtedly is probable cause.

There also is no merit to petitioner's suggestion (Br. 34-37) that the identification requirement infringes the First Amendment interest in anonymous speech. Because there is no indication that petitioner was engaged in expressive activity when he was detained, this case does not implicate any interest in anonymous speech.

of Social Servs. v. *Bouknight*, 493 U.S. 549, 556 (1990) ("The Court has on several occasions recognized that the Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the State's public purposes unrelated to the enforcement of its criminal laws."). See also *United States* v. *Hubbell*, 530 U.S. 27, 35 (2000) ("[T]he fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, such as filing an income tax return, maintaining required records, or reporting an accident, does not clothe such required conduct with the testimonial privilege.") (footnotes omitted).

2. This Court's decision in *California* v. *Byers*, 402 U.S. 424 (1971), is instructive, because that case represents the Court's only previous occasion to explore the Fifth Amendment implications of a law requiring disclosure of a person's identity. *Byers* involved a California law requiring individuals involved in an automobile accident causing property damage to stop and provide their name and address to the owner or person in charge of the affected property. This Court rejected Byers's argument that the Fifth Amendment privilege afforded him a defense to his prosecution for failing to stop and leave his name after accident.

The plurality opinion, joined by four Justices, reasoned that when "the Court is confronted with the question of a compelled disclosure that has an incriminating potential," resolution of the claim turns on "balancing the public need" against "the individual claim to constitutional protections." 402 U.S. at 427. Although the California Vehicle Code "defines some criminal offenses," the plurality explained, the hit-and-run law "was not intended to facilitate criminal convictions but to promote the satisfaction of civil liabilities arising from automobile accidents." *Id.* at 430. The plurality acknowledged that "the compelled disclosure of identity could have led to a charge that might not have been made

had the driver fled the scene." *Id.* at 434. The plurality emphasized, however, that a name merely reveals identity and that a prosecution would require development of "independent evidence." *Ibid.* In the plurality's view, therefore, "the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here." *Id.* at 428.

Justice Harlan concurred in the judgment. He emphasized "the noncriminal governmental purpose in securing the information, the necessity for self-reporting as a means of securing the information, and the [limited] nature of the disclosures involved." 402 U.S. at 458. As to the latter, Justice Harlan observed that, notwithstanding the obligation to disclose one's name and address, "the State must still bear the burden of making the main evidentiary case." *Id.* at 457.[8]

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[8] In *Baltimore Department of Social Services* v. *Bouknight*, 493 U.S. 549 (1990), the Court relied on *Byers* and similarly balanced the public interest in a compelled disclosure against the incriminating potential. That case addressed whether a mother who had been named her child's custodian could rely on her Fifth Amendment privilege to resist an order of the juvenile court to produce her child. The mother claimed that the act of producing the child would amount to a testimonial affirmation of her control over him. The Court acknowledged that in some cases the act of producing a child might incriminate the custodian. 493 U.S. at 561. The Court explained, however, that "[t]he possibility that a production order will compel testimonial assertions that may prove incriminating does not, in all contexts, justify invoking the privilege to resist production." *Id.* at 555. The Court emphasized the regulatory scheme's purpose of providing for the care and protection of children, as well as the fact that "production in the vast majority of cases will embody no incriminating testimony." *Id.* at 561. The Court thus concluded that the mother could not invoke the privilege to resist the production order. *Ibid.* The Court left open whether there may be any limitations on the State's use in a subsequent criminal prosecution of the testimonial aspects of the mother's act of production. *Ibid.*

B. Nevada's Identification Requirement Calls For Disclosure Of Inherently Neutral Information In Service Of Interests Other Than Facilitating Criminal Prosecution

As with the law upheld in *Byers*, Nevada's requirement that the subject of an investigative stop reveal his identity promotes significant government interests other than furthering criminal prosecution and does so through a narrow requirement to provide fundamentally neutral information.

1. A requirement to provide one's name calls for disclosure of inherently neutral information

a. In *Garner* v. *United States*, this Court left open the question of "what types of information are so neutral that the [Fifth Amendment] privilege could rarely, if ever, be asserted to prevent their disclosure." 424 U.S. at 651 n.3. A person's name fits squarely in that category. A name asserts no fact other than identity, and it implies nothing about one's activities, licit or illicit. As the *Byers* plurality explained, a name "identifies but does not by itself implicate anyone in criminal conduct." 402 U.S. at 434. Rather, "[d]isclosure of name * * * is an essentially neutral act." *Id.* at 432; see 4 Wayne R. LaFave, *supra*, § 9.5(g), at 304 ("it is by no means apparent that the 'right to remain silent' * * * encompasses an unlimited freedom to remain anonymous").

The essential neutrality of a name is reflected in decisions applying the rule of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The Court has defined "interrogation" for *Miranda* purposes as "words or actions * * * reasonably likely to elicit an incriminating response." *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980). The courts of appeals have held that asking a suspect his name does not qualify as "interrogation" under that standard, because "biographical [questions]—name, address, etc.—rarely elicit[] an incriminating response." *United States* v. *Ventura*, 85 F.3d 708, 712 n.5 (1st Cir. 1996);

accord *United States* v. *Bogle*, 114 F.3d 1271, 1275 (D.C. Cir.), cert. denied, 522 U.S. 938 (1997). See also *United States* v. *Reyes*, 225 F.3d 71, 77 (1st Cir. 2000) ("it would be a rare case indeed in which asking an individual his name, date of birth, and Social Security number would violate *Miranda*").[9]

b. An individual's name, while not itself incriminating, can facilitate further investigation. And the Fifth Amendment "privilege not only extends 'to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant.'" *Ohio* v. *Reiner*, 532 U.S. 17, 20 (2001) (per curiam) (quoting *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951)). Nonetheless, a name merely provides a means of referring to a person: it does not direct officers where to go, whom to speak to, or what to look for. Whatever evidence officers ultimately uncover is the product of their own independent efforts. Such evidence, in the context of a law requiring disclosure of information for reasons other than facilitating criminal prosecution, does not bear a sufficient connection to the compelled disclosure to warrant invoking the protection of the Fifth Amendment privilege.[10]

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[9] Cf. *Pennsylvania* v. *Muniz*, 496 U.S. 582, 601 (1990) (plurality opinion) (concluding that questions concerning suspect's name, address, height, weight, eye color, and age amounted to interrogation where suspected offense was driving while intoxicated and inability to answer such questions might reveal impaired mental faculties).

[10] In *United States* v. *Sullivan*, 274 U.S. 259 (1927), the Court held that the Fifth Amendment privilege affords no defense to prosecution for failing to file an income tax return. The defendant, who had made his income as a bootlegger of liquor, claimed that reporting his income could prove incriminating. The Court held that the defendant was required to claim the privilege as to specific questions instead of declining to file a return, *id.* at 263-264, and observed that it "would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized

In *Byers*, for instance, the plurality acknowledged that "compelled disclosure of identity could have led to a charge that might not have been made had the driver fled the scene." 402 U.S. at 434. But the plurality found that form of but-for causal relationship insufficient to justify applying the Fifth Amendment privilege, explaining that the possibility that disclosure of the driver's name would lead to prosecution "depend[s] on different factors and independent evidence." *Ibid.* Justice Harlan reached the same conclusion in his concurring opinion, explaining: "California's decision to compel Byers to stop after his accident and identify himself will not relieve the State of the duty to determine, entirely by virtue of its own investigation after the coerced stop, whether or not any aspect of Byer's behavior was criminal," and "the State [thus] must still bear the burden of making the main evidentiary case against Byers." *Id.* at 457. Cf. *Doe* v. *United States*, 487 U.S. 201, 215 (1988) ("Although the executed form allows the Government access to a potential source of evidence, the directive itself does not point the Government toward hidden accounts or otherwise provide information that will assist the prosecution in uncovering evidence. The Government must locate that evidence by the independent labor of its officers.") (internal quotation marks omitted).

In important respects, the hit-and-run law in *Byers* called for *more* incrimination than the identification requirement at issue here. In the circumstances of *Byers*, law enforcement officers might never come into contact with a person involved in an automobile accident if not for the driver's

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a man to refuse to state the amount of his income because it had been made in crime," *ibid.* The plurality in *Byers* explained that, although "Sullivan's tax return, of course, increased his risk of prosecution and conviction for violation of the National Prohibition Act," the "Court had no difficulty in concluding that an extension of the privilege to cover that kind of mandatory report would have been unjustified." 402 U.S. at 429.

obligation to leave his name and address at the scene. See 402 U.S. at 434 (plurality opinion). The driver thus is required to "focus[] attention on himself as an accident participant." *Id.* at 457 (Harlan, J., concurring in the judgment). By contrast, the subject of an investigative detention comes to the attention of law enforcement officers not as the result of any compelled disclosures, but instead as the result of officers' own independent observations.

c. Officers whose own observations lead them to focus their attention on a particular person ordinarily could determine his identity through means other than compelling him to state his name during an investigative detention. If the person were arrested, the government could establish his identity through fingerprint evidence taken at the time of arrest or through third-party identification or information such as an address or license plate number. Moreover, officers can search an arrestee's wallet or purse incident to arrest and thereby obtain the individual's driver's license or other form of identification. If the person were not arrested, officers could determine his identity by following him and conducting further investigation, including by talking to acquaintances or neighbors.

The issue in this case thus essentially is when—rather than whether—officers can learn the identity of a person whose conduct has drawn their attention. The Fifth Amendment does not compel an approach that would require officers to wait to determine the person's name until after an investigative detention rather than learning it when it can help to ensure their own safety and prevent imminent crime. Cf. *Bouknight*, 493 U.S. at 555 (although compliance with order to produce child might constitute compelled assertion

of child's identity, identity is "insufficiently incriminating" because "State could readily establish" it in other ways).[11]

2. Nevada's identification requirement serves important interests other than facilitating criminal prosecution

The Nevada Supreme Court found (J.A. 21-22) that the law in this case advances two state interests—ensuring officer safety and preventing the commission of crime—each of which is distinct from the government's interest in facilitating a criminal conviction. Neither of those interests thus implicates the basic Fifth Amendment concern with requiring the government to make its evidentiary case through its own independent efforts.

a. Petitioner suggests (Br. 21) that Nevada's identification requirement is materially different from the hit-and-run law at issue in *Byers* because that law "was essentially

[11] During the investigative stop itself, Nevada evidently permits the subject to comply with the identification requirement either by stating his name or by producing an identification. See Resp. Br. 13. The latter means of compliance generally raises no Fifth Amendment concerns. The document evidencing identity, which usually will have been prepared voluntarily, does not represent the suspect's compelled testimony. See, *e.g.*, *Hubbell*, 530 U.S. at 35-36 (contents of voluntarily prepared documents are not "'compelled' within the meaning of the privilege"). See also *Shapiro* v. *United States*, 335 U.S. 1 (1948) (Fifth Amendment privilege is inapplicable to required records). Although an act of production itself can amount to testimony "about the existence, custody, and authenticity of the documents," *Hubbell*, 530 U.S. at 37, the testimonial components of a requirement to produce identification would be non-incriminating in almost all situations. If compelled production of an identification generally raises no Fifth Amendment concerns, it would be anomalous to conclude that a compelled statement of identity infringes the Fifth Amendment privilege, especially when an individual can comply with the identification requirement by either route. It is not clear in this case whether petitioner was made aware that he could comply with Nevada's identification requirement by producing an identification rather than stating his name.

regulatory, not criminal, in nature." The salient distinction under the Fifth Amendment, however, is not between "criminal" and "regulatory" requirements, but between requirements designed to serve the government's interest in "facilitat[ing] criminal convictions" (*Byers*, 402 U.S. at 430 (plurality opinion)) and requirements that serve other government interests.

This Court's decisions in the Fifth Amendment context illustrate the distinction. In *New York* v. *Quarles*, 467 U.S. 649 (1984), the Court established a public safety exception to the *Miranda* rule, grounding the exception in the distinction between questioning designed to obtain incriminating evidence and questioning designed to ensure public safety. See *id.* at 658-659 ("We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect."). In this case, the government interests in compelling disclosure of identity likewise relate to ensuring the safety of officers and preventing imminent crime rather than obtaining incriminating testimony. Although the identification requirement can have the effect of facilitating further investigation, that is equally the case with "regulatory" requirements like the one at issue in *Byers*, yet the Court there denied application of the Fifth Amendment privilege.

Significantly, Nevada's identification requirement is narrowly circumscribed, requiring a statement of one's name and nothing more. The targeted nature of the requirement confirms that it serves substantial interests other than facilitating criminal prosecution. The disclosure obligation contributes significantly to officer safety and effective crime prevention, but without sweeping more broadly than necessary to serve those interests. See *Byers*, 402 U.S. at 456 (Harlan, J., concurring in the judgment) (observing that hit-and-run law involves "the minimal level of disclosure of information

consistent with the use of compelled self-reporting in the regulation of driving behavior"). Also, the fact that the State ordinarily could discover the identity of a person subject to an investigative detention without requiring disclosure at that particular time reinforces that the State's interests in ensuring officer safety and preventing crime independently support the requirement to self-identify during an investigative detention.

b. Petitioner argues (Br. 21-22) that this case raises concerns absent in *Byers* because the identification requirement targets persons "inherently suspect of criminal activities." *Byers*, 402 U.S. at 430 (plurality opinion) (quoting *Albertson* v. *SACB*, 382 U.S. 70, 79 (1965)). That argument lacks merit.

The quoted language comes from a series of decisions addressing laws requiring disclosure of "inherently illegal activity." *Byers*, 402 U.S. at 431 (plurality opinion); see *Haynes* v. *United States*, 390 U.S. 85 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968); *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Albertson*, 382 U.S. at 70. For instance, *Marchetti* and *Grosso* involved tax returns that "required disclosures only of gamblers, the great majority of whom were likely to incriminate themselves by responding," *Garner*, 424 U.S. at 660, and *Haynes* involved a firearms registration obligation that in effect required admitting criminal noncompliance with other laws, 390 U.S. at 96. The Court held in each case that the Fifth Amendment privilege afforded a defense to prosecution for failing to comply with the disclosure obligation.

The laws in those cases differ from Nevada's identification requirement in two material respects. First, in each of those cases, the nature of the information required to be disclosed itself amounted to an outright admission of crime. See *Byers*, 402 U.S. at 456 (Harlan, J., concurring in the judgment) (laws in *Marchetti* and *Grosso* "are hardly distinguishable from a governmental scheme requiring robbers to

register as such for purposes of paying an occupational tax and a tax on the proceeds of their crimes"). Second, an individual who was otherwise unknown to the government was required to call attention to himself as a criminal suspect.

By contrast, Nevada's law, far from compelling an admission of crime, merely compels disclosure of a name. In addition, while Nevada's identification requirement only arises with respect to persons reasonably suspected of engaging in crime, those persons are not required to bring themselves to the attention of law enforcement by making incriminating disclosures. Instead, they have already attracted the attention of officers by virtue of the officers' independent observations. Accordingly, as in *Byers*, the Fifth Amendment privilege affords no justification for refusing to comply with Nevada's identification requirement for investigative detentions.

C. Petitioner Cannot Establish That Nevada's Identification Requirement Infringes The Fifth Amendment On Its Face

Petitioner argues (Br. 20-25) that Nevada's identification requirement violates the Fifth Amendment on its face. That contention lacks merit. Even if the Court were to reject the government's submission that the Fifth Amendment privilege affords no basis for refusing to comply with the identification requirement, the proper course would be to leave for case-by-case resolution whether assertion of the privilege in any particular case is valid. If the privilege exists in this context, a valid assertion of it would afford a complete defense to prosecution. See, *e.g.*, *Garner*, 424 U.S. at 662-663; *Haynes*, 390 U.S. at 99.

This Court has declined to resort to facial invalidation under the Fifth Amendment even when addressing laws requiring disclosure of inherently illegal activity. In *Haynes* for instance, the Court found it "inappropriate" to "declare these sections impermissible on their face," ruling instead

that the "rights of those subject to the" disclosure obligation "will be fully protected if a proper claim of privilege is understood to provide a full defense to any prosecution * * * for failure to register." 390 U.S. at 99; accord *Marchetti*, 390 U.S. at 61 ("emphasiz[ing] that we do not hold that these wagering tax provisions are as such constitutionally impermissible," but instead "that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply").

Consequently, if the Court were to conclude that the Fifth Amendment can justify a refusal of a suspect in an investigative detention to provide his name, petitioner would have a defense to his prosecution for failing to comply with the identification requirement if he properly asserted the privilege and his assertion was valid on the facts of this case. See *Marchetti*, 390 U.S. at 60-61.[12] Petitioner argues (Br. 23) that he reasonably feared incrimination from disclosing his last name because it could have been used to establish his relationship with his daughter in a prosecution for domestic battery. Because no court has addressed the merits of that argument or whether petitioner waived any Fifth Amendment claim by failing to raise the privilege as a defense at trial, see *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 113 (1927), this Court should remand for a determination of those issues if it concludes that a Fifth Amendment defense is available. See *Haynes*, 390 U.S. at 100.[13]

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[12] There is no merit to the contention of petitioner's amicus Electronic Frontier Foundation (Br. 4-5) that an individual is entitled to a judicial determination of whether a disclosure would qualify as incriminating before he must decide whether to disclose. See *Garner*, 424 U.S. at 664-665.

[13] The government is advised by the State that petitioner did not raise a Fifth Amendment defense at trial. Accordingly, the trial court had no occasion to address whether petitioner's present arguments concerning incrimination would establish a valid assertion of the privilege. The State did not argue that petitioner had waived his Fifth Amendment claim either in the Nevada appellate courts or in its brief in opposition in this Court.

CONCLUSION

The judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

vs.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF HUMBOLDT, and the HONORABLE RICHARD A. WAGNER, District Judge,

Respondents.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does it violate the Fifth Amendment's self-incrimination privilege to require a suspect validly stopped under *Terry* v. *Ohio*, 392 U. S. 1 (1968) to provide identification at the request of the stopping officer?

2. Is this identification requirement an illegal seizure under the Fourth Amendment?

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IN THE

Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

vs.

THE SIXTH JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR
THE COUNTY OF HUMBOLDT, and the
HONORABLE RICHARD A. WAGNER, District Judge,

Respondents.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

This case addresses whether the Fourth and Fifth Amendments prevent the government from allowing police officers to demand identification from suspects validly stopped under *Terry* v. *Ohio*. *Terry* stops are intended to prevent or solve crimes through investigation that is less intrusive than a search or an arrest. Determining the identity of a suspect is essential to an effective *Terry* stop. Identity helps find the most culpable and allows for the early release of innocent suspects. Determining identity also allows police to release suspects while retaining the ability to contact them later. This important investigative tool is minimally intrusive and does not involve any compulsion of incriminating testimonial information. Upholding Nevada's stop and identify statute is vital to public safety and therefore serves the interests of victims of crime and law-abiding society that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

On May 21, 2001, Humboldt County Sheriff's Deputy Lee Dove received a call from police dispatch that a concerned citizen saw someone hitting a female passenger in a truck. See *Hiibel* v. *Sixth Judicial District Court*, 59 P. 3d 1201, 1203 (Nev. 2002); J. A. 3. Deputy Dove responded to the call and spoke to the concerned citizen, who pointed out the truck. The deputy noticed skid marks in the gravel, suggesting that the truck had been parked suddenly and aggressively. See *ibid.* He saw the defendant, Larry D. Hiibel, standing outside the truck. Dove concluded that Hiibel "was intoxicated based on his eyes, mannerisms, speech, and odor." *Ibid.* Hiibel's daughter, a minor, was in the passenger seat of the truck.

Under Nevada law, a person stopped by a police officer under a reasonable suspicion standard "shall identify himself" to the officer. See *ibid.*; Nevada Revised Statutes ("NRS") 171.123. Dove asked Hiibel to identify himself but Hiibel refused and instead put "his hands behind his back and challenged the officer to take him to jail." 59 P. 3d, at 1203. Hiibel

refused to provide any identification, because he believed that he had done nothing wrong. See *ibid.* Hiibel was arrested after he declined 11 separate requests for identification. See *ibid.* He was next charged with resisting a public officer and convicted by the justice of the peace of that offense. See *ibid.*; NRS 199.280.

The Nevada District Court upheld Hiibel's conviction on appeal, finding that NRS 171.123 did not violate the Fifth Amendment. See 59 P. 3d, at 1203-1204. The conviction was affirmed by the Nevada Supreme Court. It held that NRS 171.123 "does not violate the Fourth Amendment because it strikes a balance between constitutional protections of privacy and the need to protect police officers and the public." *Id.*, at 1203. Balancing the public interest in requiring suspicious individuals to identify themselves to the police with an individual's privacy interests, the court found that the obligation to identify imposed by NRS 171.123 was reasonable. See *id.*, at 1205. This "common sense" requirement was "good law consistent with the Fourth Amendment." *Id.*, at 1207. This Court granted certiorari on October 20, 2003.

SUMMARY OF ARGUMENT

This case is an appropriate vehicle for determining whether the government may require a person validly stopped under *Terry* v. *Ohio*, 392 U. S. 1 (1968) to provide identification to the investigating officer. *Brown* v. *Texas*, 443 U. S. 47 (1979) does not control because the stop in this case was supported by reasonable suspicion. *Kolender* v. *Lawson*, 461 U. S. 352 (1983) is not relevant because the petitioner does not make a vagueness challenge.

The identification requirement does not violate the Fifth Amendment's self-incrimination privilege. The self-incrimination privilege only applies to compelled statements which are incriminating and testimonial. Identification is not incriminating in the context of a *Terry* stop. Identification can be

incriminating when a person is required to identify oneself with some criminal matter such as membership in an illegal organization or participation in an illegal activity. Identity at a *Terry* stop does not do this. While identity will aid the investigation, it does not by itself incriminate the suspect.

Fourth Amendment analysis of the Nevada statute first focuses on the relevant privacy interests. The demands of modern society minimize an individual's interest in the privacy of his or her identity. Establishing and maintaining proof of identity is essential for anyone to participate in modern society in any meaningful way. Employment, government benefits, driving, and credit are only some of the activities that require identification. When something is repeatedly exposed to the public, any reasonable expectation of privacy rapidly diminishes. Nevada knew who petitioner was, and his privacy interest in remaining anonymous to Deputy Dove was minimal. Although not dispositive, the lack of anonymity with respect to the government is telling.

While there is little privacy interest in identity, the act of requiring someone to comply with an identification request is a seizure. The seizure is minimal, however, because compliance is easy and routine for most individuals. Most people carry some form of identification with them when in public. Since the act of producing identification for someone is simple and routine for most, Nevada's identification requirement does not burden an individual to any constitutionally significant degree. *Terry* stops are meant to investigate, and the minimally intrusive request for identification is a natural part of this investigation.

An identification requirement neither threatens individuals with arrests at an officer's discretion, nor subverts the probable cause standard. Stop and identify statutes do not threaten individuals with arbitrary arrest, because *Brown* v. *Texas* requires that the initial stop must be based upon reasonable suspicion before an identification statute can apply. Although less rigorous than probable cause, reasonable suspicion is still

an objective standard that requires an officer to justify the temporary seizure with articulable facts. This prevents random stops and thus controls officer discretion. The probable cause standard is not threatened because arrests are only authorized when the identification statute is violated. If an officer does not have probable cause to suspect that the detained individual violated the identification requirement, then there can be no arrest. The petitioner's assertions to the contrary reflect hyperbole and dissatisfaction with this Court's Fourth Amendment jurisprudence.

Because Nevada's identification requirement is reasonable, it complies with the Fourth Amendment. While history is often crucial to Fourth Amendment analysis, it is inapplicable here because the pervasive use of identification did not exist at the common law. Where history is not relevant, then the constitutionality of an intrusion is determined by balancing government and individual interests to determine whether the intrusion is reasonable.

Requiring *Terry* detainees to identify themselves is reasonable. Finding the suspect's identification is essential to an effective *Terry* stop. It allows police to more readily find dangerous individuals, such as fugitives or those with outstanding warrants. It can also lead to the quick release of the innocent when the police are looking for a particular individual or class of criminals. In more ambiguous cases, it allows the officer to release the suspect with the prospect of being able to contact him or her in the future for more investigation. When balanced against its minimal privacy costs, the Nevada identification requirement is reasonable and therefore constitutional.

ARGUMENT

On two separate occasions, this Court has declined to address whether the government may require a person validly stopped under *Terry* v. *Ohio*, 392 U. S. 1 (1968) to provide identification to the investigating officer. In *Brown* v. *Texas*,

443 U. S. 47, 51-52 (1979), the stop was not supported by reasonable suspicion, so there was no reason to address this issue. In *Kolender* v. *Lawson*, 461 U. S. 352 (1983), the unconstitutional vagueness of the identification requirement foreclosed any further constitutional analysis. See *id.*, at 361-362, n. 10. These problems are absent in the present case. The citizen complaint and Deputy Dove's personal observations, see *supra*, at 2, readily support a reasonable suspicion that Hiibel had committed a battery against the girl and had been driving while intoxicated. There is also no claim properly before this Court that NRS 171.123 is unconstitutionally vague. This issue apparently was not raised before the Nevada Supreme Court. Its opinion "address[ed] the merits of Hiibel's constitutional challenge to NRS 171.123(3)." *Hiibel* v. *Sixth Judicial District Court*, 59 P. 3d 1201, 1204 (Nev. 2002). The opinion only addressed the contention that the statute violated the Fourth Amendment. See *id.*, at 1207. The petitioner addresses the vagueness issue in one sentence. "Moreover, although certainly a strong argument can be made that the Nevada statute is unconstitutionally vague, cf. *Kolender*, *supra*, at 361, it is Mr. Hiibel's contention that even if the statute could be rewritten in such a way that it would not be vague, it would nevertheless be unconstitutional as violative of the Fifth and Fourth Amendments." Pet. Brief 15. This is not a vagueness challenge. Any ambiguity in this statement is resolved in the next paragraph of his brief:

> "Mr. Hiibel is, however, asserting that although the police authorities have the right to ask questions, he is not required to answer those questions, in particular questions regarding his identity, and that his failure to do so should not result in criminal sanctions which can include arrest, a fine, and jail. For the reasons that follow, Nev. Rev. Stat. 171.123(3) is *violative of the Fifth and Fourth Amendments* to the United States Constitution." *Ibid.* (footnote omitted; emphasis added).

Issues not briefed before this Court should not be addressed by it. See *Kentucky Dept. of Corrections* v. *Thompson*, 490 U. S. 454, 465, n. 5 (1989). Petitioner's effective abandonment of the vagueness challenge places the Fourth and Fifth Amendment issues squarely before this Court.

I. Requiring a *Terry* detainee to provide identification does not violate the Fifth Amendment's self-incrimination privilege.

The Fifth Amendment privilege against compelled self-incrimination has three conditions that must be met before it applies—compulsion, testimony, and incrimination. See *Baltimore City Dept. of Social Servs.* v. *Bouknight*, 493 U. S. 549, 554 (1990). While NRS 171.123 has the necessary compulsion, the threat of prosecution for resisting a public officer, see *supra*, at 2, its identification requirement lacks the incriminatory aspect needed to invoke the privilege.

California v. *Byers*, 402 U. S. 424 (1971) is the decision closest to the present case. *Byers* held that a California statute requiring the driver of an automobile in an accident to remain at the scene and provide one's name and address did not violate the Fifth Amendment. See *id.*, at 425, 427 (plurality); *id.*, at 458 (Harlan, J., concurring). The plurality opinion appropriately noted that giving out comparatively innocuous identifying information is both commonplace and necessary.

> "An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours, and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollut-

ants discharged into our waters and atmosphere. Comparable examples are legion." *Id.*, at 427-428.

Therefore, the mere possibility that the information provided may incriminate is insufficient to invoke the privilege. See *id.*, at 428. The risk of self-incrimination must be "'substantial'" before the privilege is applicable. See *id.*, at 429. For example, during prohibition a bootlegger could not claim a complete exemption from filing a federal income tax return simply because it increased his chance of being prosecuted and convicted by revealing the illegal source of his income. See *United States* v. *Sullivan*, 274 U. S. 259, 263-264 (1927).

The Fifth Amendment prohibits a much narrower, more focused, and more incriminating class of government compulsion. While filing an income tax return, or providing one's identification at an auto accident did not implicate the privilege, requiring members of the Communist Party to register with the Attorney General did. See *Albertson* v. *Subversive Activities Control Bd.*, 382 U. S. 70, 78 (1965). *Albertson* turned on the fact that "[t]he risks of incrimination which the petitioners take in registering are obvious." *Id.*, at 77. When *Albertson* was decided, membership in the Communist Party opened one to prosecution under several federal statutes. See *ibid.* Therefore, even "mere association with the Communist Party presents sufficient threat of prosecution to support a claim of privilege." *Ibid.* The statute did not simply require Albertson to identify himself. Rather, it required him to step forward from the crowd and identify himself as a *Communist Party Member*. At the time, that was tantamount to confessing to a crime. The conclusion that a law requiring someone to give this information to the government violates the Fifth Amendment is simple common sense.

The *Byers* plurality used *Albertson* as a template for its incrimination analysis. Most important to this was a passage in *Albertson* distinguishing *Sullivan*.

> "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a *highly selective group inherently suspect of criminal activities*. Petitioners' claims are not asserted in an *essentially noncriminal* and *regulatory area* of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the . . . questions in context might involve the petitioners in the admission of a crucial element of a crime." *Byers*, 402 U. S., at 429 (quoting *Albertson*, 382 U. S., at 79) (emphasis added in *Byers*).

Since *Byers* involved a law designed primarily "to promote the satisfaction of civil liabilities arising from automobile accidents," *id.*, at 430, the plurality naturally emphasized the regulatory, noncriminal aspects of the California "hit and run" statute. This fact does not render *Byers* irrelevant. Although the subject matter of *Terry* stops is essentially criminal, there is nothing inherently incriminating about identifying oneself to an officer.

Identity is neutral information that does not incriminate the declarant in the context of a *Terry* stop. A *Terry* stop is based upon reasonable suspicion that "criminal activity may be afoot." *Terry* v. *Ohio*, 392 U. S. 1, 30 (1968), a standard lower than probable cause to arrest, and far less than the necessary proof to prosecute and convict. See *Illinois* v. *Wardlow*, 528 U. S. 119, 123 (2000). Identification at this preliminary stage of an investigation is far removed from the highly incriminating information that the Fifth Amendment protects from compulsion. Indeed, in some cases providing identification will exonerate the suspect and quickly terminate the *Terry* stop. See *infra*, at 26. In addition to the effective confession struck down in *Albertson*, this Court has applied the Fifth Amendment to federal wagering tax statutes, see *Marchetti* v. *United States*, 390 U. S. 39, 41-42 (1968), and a federal firearms registration requirement, see *Haynes* v. *United States*, 390 U. S. 85, 86-87 (1968). Like *Albertson*, the statutes in *Marchetti* and *Haynes*

posed a much higher risk of self-incrimination than found in this case.

The wagering tax in *Marchetti* required those accepting wagers to pay an excise tax and register their occupation, names, and addresses with the federal government. See 390 U. S., at 42-43. Given the pervasive illegality of this occupation, see *id.*, at 44, registration placed the declarant at a substantial risk of prosecution and conviction. "Unlike the income tax return in question in [*Sullivan*], every portion of these requirements had the direct and unmistakable consequence of incriminating petitioner . . . ." *Id.*, at 48-49. The firearm registration in *Haynes* was no different. Those it primarily applied to would also be in violation of other federal firearm statutes. See *Haynes*, 390 U. S., at 96. Registering would notify the government of this and put the declarant at a considerably higher risk of prosecution. See *id.*, at 97. "[T]he correlation between obligations to register and violations can only be regarded as exceedingly high . . . ." *Ibid.*

The correlation between identification and prosecution is significantly lower in the context of *Terry* stops. *Terry* exists at the lowest end of the culpability spectrum. Probable cause is itself far removed from proof of guilt. Therefore, the fact that an arrestee is later proven innocent does not necessarily contradict the initial probable cause finding. See *Hill* v. *California*, 401 U. S. 797, 804 (1971). Since reasonable suspicion is an even lower standard, see *United States* v. *Sokolow*, 490 U. S. 1, 7 (1989), it follows that many people subject to *Terry* stops will never be prosecuted. While providing identification may aid the detaining officer's investigation of the suspect, it does not associate the suspect with conduct that is itself criminal, and proves no element of any crime. Lacking this substantial risk of incrimination, the Fifth Amendment privilege is inapplicable.

Justice Harlan's concurrence in *Byers* is consistent with the plurality opinion on this point. While the plurality readily distinguished the *Marchetti* line of cases, see 402 U. S., at 430, Justice Harlan would instead limit this line of cases "[t]o the extent that [it] appears to suggest that the presence of perceivable risks of incrimination in and of itself justifies imposition of a use restriction on the information gained by the Government through compelled self-reporting . . . ." *Id.*, at 452-453 (Harlan, J., concurring). This appears to be the main difference between the two opinions. There was no fundamental disagreement with the plurality on why the California statute satisfied the Fifth Amendment, and Justice Harlan's opinion is consistent with upholding the statute in this case. The schemes struck down in *Marchetti* and other cases "focused almost exclusively on conduct which was criminal." *Id.*, at 454. Being the subject of a *Terry* stop is not itself a crime, and providing identification does not tie the suspect to criminal conduct. Compliance with the schemes like the one in *Marchetti* reduced the accusatory system to a ritual for affirming guilt "secured through the exercise of the taxing power." *Id.*, at 456. The noncriminal nature of California's reporting scheme and the need for getting the information meant that there was no need to provide a use immunity for the information under the Fifth Amendment privilege. See *id.*, at 458. The California scheme did not turn a criminal trial into a "merely ritualistic confirmation of the 'conviction' secured through compliance with the reporting requirement," *ibid.*, and neither does NRS 171.123. The Nevada statute is therefore consistent with the Fifth Amendment analysis approved by a majority of this Court in *Byers*.

Petitioner's support for his Fifth Amendment case is little more than exaggerated dicta. He properly notes that the Fifth Amendment privilege applies to *Terry* stops. See Pet. Brief 19. This is basic Fifth Amendment law, as the government cannot compel self-incriminating testimonial disclosures regardless of the context of the questioning. See *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973). Petitioner begs the important question,

which is whether the compelled information is both sufficiently incriminatory and testimonial to be protected by the privilege.

The statements from this Court's opinions cited by the petitioner, see Pet. Brief 13-14, do not support invalidating NRS 171.123. It is true that this Court said about questioning at a *Terry* stop: "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond." *Berkemer* v. *McCarty*, 468 U. S. 420, 439 (1984) (footnotes omitted). *Berkemer* addressed whether *Miranda* v. *Arizona*, 384 U. S. 436 (1966) applied to custodial interrogation of a suspect accused of a misdemeanor traffic offense, and whether "roadside questioning pursuant to a traffic stop constitutes custodial interrogation for the purposes of the doctrine enunciated in *Miranda*?" 468 U. S., at 422-423. The passage from *Berkemer* is merely dicta, which petitioner implicitly recognizes when he admits that the Fifth Amendment issue is still undecided. See Pet. Brief 12.

The *Berkemer* majority found a traffic stop more analogous to a *Terry* stop than a formal arrest. See 468 U. S., at 439. An officer can certainly demand identification from a stopped motorist and arrest a driver who does not produce identification for driving without a license. See *New York* v. *Class*, 475 U. S. 106, 120 (1986) (Powell, J., concurring); *Gustafson* v. *Florida*, 414 U. S. 260, 261-262 (1973). While neither *Gustafson* nor the *Class* concurrence address Fifth Amendment issues, this is understandable since it is a given that an officer can demand identification from a driver stopped at a traffic stop supported by reasonable suspicion. See *Delaware* v. *Prouse*, 440 U. S. 648, 676 (1979). The special need for identification with respect to drivers and automobiles precludes *Prouse* from being dispositive on the Fourth Amendment outside its automobile context. However, its Fifth Amendment relevance is undiminished since there is no automotive exception to the Fifth Amendment. Cf. *Berkemer*, 468 U. S., at 441 (*Miranda* can

apply to a traffic stop if the facts show custody). If a demand for identification violates the Fifth Amendment at a *Terry* stop on the street, then it does so in other contexts like automotive stops or post-arrest bookings. Since extending the self-incrimination privilege to those situations is unthinkable, it is equally inapplicable to requests for identification at *Terry* stops.

Most of the other statements quoted by the petitioner are concurrences or dissents, which lack precedential value. See Pet. Brief 13-14 (citing *Terry*, 392 U. S., at 34 (White, J., concurring); *id.*, at 33 (Harlan, J., concurring); *Michigan* v. *DeFillipo*, 443 U. S. 31, 44 (1979) (Brennan, J., dissenting)). Petitioner attempts to reinforce this meager authority with a quote from one other majority opinion, *Davis* v. *Mississippi*, 394 U. S. 721 (1969).

> "The State relies on various statements in our cases which approve general questioning of citizens in the course of investigating a crime . . . . *But these statements merely reiterated the settled principle that while the police have the right to request citizens to answer to voluntary questions concerning unsolved crimes they have no right to compel them to answer.*" Pet. Brief 13 (quoting *Davis*, 394 U. S., at 727, n. 6) (emphasis added by Petitioner).

This begs the Fifth Amendment question. *Byers* and *Sullivan* both demonstrate that the government can compel individuals to provide identifying information so long as it is not both incriminating and testimonial. The Fifth Amendment is not a general right to refuse to answer questions, as anyone who has filled out an income tax form or testified at trial can confirm. While identification is incriminating and testimonial in some contexts, like a gambling registry, *Terry* stops do not present the risk of incriminating testimony to invoke the privilege.

II. The demands of modern society minimize the privacy interest in basic identifying information.

The Petitioner also turns to the Fourth Amendment for relief. See Pet. Brief 26-43. This argument is no better than his Fifth Amendment claims. The minimal intrusiveness of NRS 171.123 upon any reasonable expectation of privacy, when balanced against the substantial government need served by the statute, protects the identification requirement from Fourth Amendment attack.

A key to understanding why Nevada's identification requirement does not violate the Fourth Amendment is the very public nature of our identities. The main case addressing the relationship between identity and the Fifth Amendment noted that modern society required its members to provide identification in many situations. See *California* v. *Byers*, 402 U. S. 424, 427-428 (1971) (plurality opinion). Although made in the context of a Fifth Amendment decision, this point is equally relevant to Fourth Amendment claims. The Fourth Amendment only protects reasonable expectations of privacy. See *California* v. *Greenwood*, 486 U. S. 35, 39 (1988). While the person asserting a Fourth Amendment claim must have a subjective expectation of privacy, the Constitution only protects those expectations which society deems reasonable. See *id.*, at 39-40. Determining whether the subjective expectation is objectively reasonable requires a balancing of interests. See *Hudson* v. *Palmer*, 468 U. S. 517, 527 (1984). The interests balanced are those of society against the individual's desire for privacy. See *ibid.* (balancing society's interests in prison security against the prisoner's privacy interest in his cell). "'[I]llegitimate'" expectations of privacy are not protected by the Fourth Amendment. See *New Jersey* v. *T. L. O.*, 469 U. S. 325, 338 (1985).

Before the interests can be balanced, it is important to examine what Hiibel wants to keep private. The Nevada statute creates two potential privacy invasions, extending the detention so that the individual may produce identification, and requiring the detainee to expose his or her identity to the officer. Neither

invasion involves more than a minor intrusion upon individual privacy.

Public exposure substantially limits any reasonable expectations of privacy. In one famous example, there is no reasonable expectation of privacy in garbage that has been left on the curb, as that act exposes it to the public. See *Greenwood*, 486 U. S., at 40-41. It is unreasonable to expect police "to avert their eyes from evidence of criminal activity that could have been observed by any member of the public." *Id.*, at 41. "Hence, '[w]hat a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection.'" *Ibid.* (quoting *Katz* v. *United States*, 389 U. S. 347, 351 (1967)).

Although it has important privacy aspects, identity is essentially public. As the *Byers* plurality noted, it is almost impossible to function in modern society without providing identification to many government agencies and public operations. See *supra*, at 7. Those who do not identify themselves operate at the margins of society, or are breaking the law by illegally entering the country.

Even though there is no national identification card, citizens, tourists, and resident aliens carry numerous forms of identification with them. Driver's licenses, social security cards, and credit cards are commonly carried by individuals. See Comment, Conceptualizing National Identification: Informational Privacy Rights Protected, 19 John Marshall L. Rev. 1007, 1009 (1986) (Conceptualizing National Identification). "On a *de facto* basis, the United States already has a national ID system. It includes a birth certificate, driver's license, and many job related documents in addition to the social security card." J. Eaton, Card-Carrying Americans 2 (1986). We carry such information not simply out of some obligation imposed by a bureaucratic society, but because ready identification benefits both individuals and society.

"The government holds vast amounts of personal information about individuals in the form of computerized records. The government has collected personal information for one basic reason: citizens in the United States are dependent on the government for a variety of goods, services, benefits and obligations. Such dependency necessitates the collection of information because administrative actions must precede each benefit received or obligation incurred." Conceptualizing National Identification, 19 John Marshall L. Rev., at 1010 (footnotes omitted); see also Linowes, Must Personal Privacy Die in the Computer Age, 65 A. B. A. J. 1180, 1182 (Aug. 1979) ("Administrators responsible for furnishing these services must satisfy themselves of a person's eligibility by demanding and getting personal, often sensitive, information").

Providing identification is also necessary for private transactions like obtaining credit. See LoPucki, Did Privacy Cause Identity Theft? 54 Hastings L. J. 1277, 1280 (2003). The credit reporting system requires that thousands of people know intimate identifying information about an individual. See *id.*, at 1280-1281. It is next to impossible for any of us to be truly anonymous.

The Fourth Amendment is not violated by compelling production of "physical characteristics" which are "constantly exposed to the public." *United States* v. *Dionisio*, 410 U. S. 1, 14 (1973). Since everyone speaks and writes except for the "'rare recluse,'" there is no reasonable expectation of privacy in a voice or handwriting sample. See *ibid.* Although the "'content of a communication is entitled to Fourth Amendment protection . . . the underlying identifying characteristics—the constant factor throughout both public and private communications—are open for all to see or hear.'" *Ibid.* Obtaining these identifying characteristics does not invade one's privacy. See *id.*, at 15. Fingerprinting is similarly unintrusive with respect to the Fourth Amendment, since it "'involves none of the probing into an individual's private life and thoughts that

marks an interrogation or search.'" *Ibid.* (quoting *Davis* v. *Mississippi*, 394 U. S. 721, 727 (1969)). The constitutional problem in *Davis* was not the fingerprinting, but the suspicionless "initial dragnet detentions" that led to the fingerprinting. See *ibid.*

These cases demonstrate that the compelled disclosure of public identifying characteristics lacks the necessary invasion of privacy to invoke the Fourth Amendment. The compelled identification in this case is no different. Except for fugitives from justice or the odd loner, our identities are as public as handwriting or the sound of one's voice. In some ways, identity is even more public than those two examples, since it is not necessary to use an expert witness to determine identity from a driver's license or similar form of identification. Since we constantly expose who we are to the public and the government, we have no reasonable expectation of privacy in identifying ourselves to officers after a valid *Terry* stop.

The State of Nevada knew who Hiibel was before Officer Dove asked him for identification. As a driver,[2] Hiibel was subject to the licensing and vehicle registration system necessary for highway safety. See *Delaware* v. *Prouse*, 440 U. S. 648, 658 (1979). While Officer Dove did not know Hiibel's identity at their encounter, Hiibel was far from anonymous. His desire not to identify himself did not protect any legitimate privacy interest.

Identifying information can cause considerable harm to an individual if it falls into the wrong hands. Identity theft is a growing problem, see LoPucki, Human Identification Theory and the Identity Theft Problem, 80 Tex. L. Rev. 89, 89-90 (2002), that causes considerable financial damage and personal inconvenience to those whose identities are "stolen." See *id.*,

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2. Hiibel was found just outside a truck in which his minor daughter was seated. See *supra*, at 2. Although there is no finding on this point in the record, it is logical to conclude that he was driving just before the encounter with Deputy Dove.

at 94-95. This very real privacy interest is not implicated by NRS 171.123. Barring a separate fraudulent act by police officials, demanding identification at a *Terry* stop will not aid identity theft.

Since the Fourth Amendment is both more and less than a general constitutional right to privacy, see *Katz* v. *United States*, 389 U. S. 347, 350-351 (1967), this privacy issue is not dispositive. But in the balancing of interests that determines Fourth Amendment reasonableness, the lack of privacy in one's identification is telling. Since Hiibel had no expectation of privacy in his identity, its exposure to Officer Dove does not implicate the Fourth Amendment. While requiring him to produce identifying information implicates Fourth Amendment interests, see Part III, *infra*, our inability to be anonymous minimizes the intrusiveness of NRS 171.123.

III. Requiring *Terry* detainees to provide identification is minimally intrusive and does not threaten individuals with arbitrary arrests.

While there is no Fourth Amendment interest in keeping one's identity private from the government, see Part II, *supra*, the act of compelling its production raises other Fourth Amendment issues. Compelling production of an individual's identity is a seizure that is separate from the privacy interest in identity. It is also claimed that stop and identify statutes threaten individuals with arbitrary arrests. NRS 171.123's seizure is minimal, and does not subvert probable cause through arbitrary arrests.

A. Minimal Intrusion.

A seizure occurs when "by means of physical force or a show of authority [an individual's] freedom of movement is restrained." *United States* v. *Mendenhall*, 446 U. S. 544, 553 (1980). The initial *Terry* detention that is a prerequisite for applying NRS 171.123 is a seizure, see *Terry* v. *Ohio*, 392 U. S.

1, 16 (1968), and conditioning its termination upon producing identification necessarily involves a seizure. Detaining someone for the purpose of providing identification is a seizure, see *Brown* v. *Texas*, 443 U. S. 47, 50 (1979) and must be supported by some reasonable suspicion. See *id.*, at 51-52.

In *Brown*, two officers in a patrol car observed two individuals walking in an alley one afternoon in El Paso, Texas. See *id.*, at 48. Brown was stopped by the officers and "asked . . . to identify himself and explain what he was doing there." *Id.*, at 48-49. An officer testified that Brown was stopped because he " 'looked suspicious and we had never seen that subject in that area before.' " *Id.*, at 49. The stop took place in an area with a high level of drug traffic, but Brown was not suspected of any "specific misconduct." *Ibid.* Brown repeatedly refused to identify himself, and was arrested for and convicted of violating a Texas stop-and-identify statute. See *ibid.* This Court held that detention for the purpose of identification is a seizure that must be reasonable under the Fourth Amendment. See *id.*, at 50. Since the stop was not supported by reasonable suspicion, see *id.*, at 51-52, the detention was unreasonable, and therefore the statute could not apply to Brown without violating the Fourth Amendment. See *id.*, at 53. The Court explicitly refrained from deciding the question in the present case. *Id.*, at 53, n. 3.

Brown does not control this case because Hiibel's stop was supported by reasonable suspicion. See *supra*, at 5. In the context of a *Terry* stop, the seizure in this case is minimal. Since it is almost impossible to function in modern society without providing identifying information to the government, see *supra*, at 15-17, individuals out in public will almost always carry some form of identification with them. Since Hiibel had been driving a truck, he was required by law to carry a driver's

license. See NRS 483.350.[3] In this, as in almost every case, Hiibel could have complied with the request had he chosen to. The information he would have given the officer was not private. See Part II, *supra*. The act necessary to comply with a request for identification is typically minor and routine, reaching into one's pocket or purse and producing an identifying card such as a driver's license. Since identifying oneself to third parties is common, easy, and minimally intrusive, Deputy Dove's request did not burden Hiibel to any constitutionally significant degree.[4]

Terry reflects the Fourth Amendment's pragmatism. Situations that warrant some investigation and pose a limited threat to officer safety can support intrusions that fall short of a general search or an arrest. See *Terry*, 392 U. S., at 30-31. *Terry* is based on the principle that the Fourth Amendment is not "a rigid all-or-nothing model of justification and regulation," see *id.*, at 17, but rather a careful balancing of interests. See *id.*, at 21. Whether an intrusion is legal under *Terry* is first judged by whether the intrusion serves these interests.

The purpose of a *Terry* stop is crime detection and prevention, see *id.*, at 22, which requires a flexible approach to its limits. For example, there is no bright-line rule governing the length of a permissible detention under *Terry*. Even though it was first contemplated that *Terry* stops would be brief, see *Adams* v. *Williams*, 407 U. S. 143, 146 (1972), experience showed that it was necessary to expand the permissible length of the stop when more time was needed to investigate the suspicious activity. See *Michigan* v. *Summers*, 452 U. S. 692,

3. An individual arrested for violating this statute has a complete defense to the charge if he or she provides the Court with a valid driver's license at trial. See NRS 483.350.

4. The fact that Hiibel was identified after his arrest, see J. A. 2, indicates that he could have produced identification to comply with Deputy Dove's request.

700-701, n. 12 (1981). *Terry* can expand to accommodate reasonable public safety needs.

Determining the suspicious person's identity is part of any legitimate *Terry* investigation. See *Adams*, 407 U. S., at 146, See Part IV, *infra*. The ability to identify the suspect is particularly important because *Terry* is not limited to investigating potential crimes. *Terry* stops are also allowed to investigate a completed felony. See *United States* v. *Hensley*, 469 U. S. 221, 229 (1985). Obtaining identification of an individual suspected of having committed a crime is essential to the *Terry* stop and investigation. "[W]here police have been unable to locate a person suspected of involvement in a past crime, the ability to briefly stop that person, ask questions, *or check identification* in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice." *Ibid.* (emphasis added).

Since complying with this part of the investigation is usually easy, involves minimal physical effort, and does not expose private information, compelling identification is comparatively unintrusive in the context of *Terry*. As the next section demonstrates, the real objections to stop and identify statutes are aimed at the substance of the statutes rather than any legitimate Fourth Amendment interests.

B. Compulsion and Terry.

Rather than focusing exclusively on traditional Fourth Amendment concepts such as privacy, opponents of stop and identify statutes also assert that these laws place too much power in the hands of the police. In essence, the claim is that it allows an officer to circumvent the probable cause standard by transforming a *Terry* stop into a custodial arrest. See Pet. Brief 26-33; *Kolender* v. *Lawson*, 461 U. S. 352, 365-367 (1983) (Brennan., J., concurring). Since both *Terry* and the probable cause standard protect individuals from arbitrary arrests, this concern is unfounded.

The Fourth Amendment requires that most searches and seizures be justified by some form of objective suspicion to limit the discretion of government officials and prevent the arbitrary invasion of privacy by the government. A primary consideration in the balancing of interests underlying the Fourth Amendment reasonableness test, "has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown* v. *Texas*, 443 U. S. 46, 51 (1979). The need to control police discretion is why the state cannot compel an individual to provide identification to an officer at a stop that was not justified by reasonable suspicion. See *id.*, at 52.

This problem is absent in this case, since the initial stop was supported by reasonable suspicion. While any level of objective suspicion will tend to limit officer discretion, the level of suspicion needed to justify the intrusion also limits unnecessary intrusions upon privacy. Greater intrusions require more justification through a higher level of suspicion, while lesser intrusions need less suspicion. Therefore, while the more limited *Terry* stop only requires reasonable suspicion, see *Illinois* v. *Wardlow*, 528 U. S. 119, 123 (2000); an arrest requires probable cause. See U. S. Const., Amend IV; *Atwater* v. *City of Lago Vista*, 532 U. S. 318, 354 (2001). The level of suspicion is like the price paid by the government in order to comply with the Fourth Amendment.

Nevada paid the proper price in this case. The initial stop was a *Terry* stop, and was amply justified under the reasonable suspicion standard. Given the minimal intrusion of the demand for identification and the ease of complying with the demand, the substantial government interest in obtaining identification to aid investigation justifies this intrusion under the Fourth Amendment reasonableness standard. See Part IV, *infra*. Hiibel's arrest was based on probable cause. The statute required that he provide identification; failure to do so was a crime. Refusing eleven separate requests to comply with this duty to identify, see *supra*, at 2, gave Deputy Dove probable

cause to believe that Hiibel had committed the crime of resisting a public officer. See NRS 199.280.

This does not convert every *Terry* stop into a potential arrest at the officer's unfettered discretion. An identification requirement is relatively easy for most people to satisfy, since most of us carry some form of identification. Any identification statute must also provide a sufficiently precise standard for complying with its requirements to avoid the void for vagueness doctrine, see *Kolender*, 461 U. S., at 358,[5] which itself limits the officer's discretion. Arrest is possible only if the stopped individual provides the officer with probable cause to believe that the suspect has failed to comply with an appropriately narrow identification requirement.[6] The facts of this case show no abuse of discretion, as Hiibel's foolish belligerence effectively invited an arrest. See *supra*, at 2.

Petitioner's claims on this point do no more than reflect dissatisfaction with *Terry* and most Fourth Amendment precedents. He asserts that *Terry*'s flexible standard will not protect individuals from arrest at the officer's discretion. " 'Suspicion involves so low a degree of belief and so subjective a judgment that it is impossible . . . to draw a line between "mere" suspicion and a "reasonable" suspicion.' " Pet. Brief 11 (quoting Schwartz, Stop and Frisk (A Case Study in Judicial Control of the Police), 58 J. Crim. L. Criminology & Police Sci. 433, 445 (1967)). He also notes that this Court has stated that " 'the concept of reasonable suspicion is somewhat abstract,' and that 'the cause "sufficient to authorize police to stop a person" is an "elusive concept." ' " *Id.*, at 10 (quoting *United*

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5. Petitioner has not raised a vagueness challenge to NRS 171.123, see *supra*, at 5-7.

6. The statutory language does not require written proof of identification. See NRS 171.123(3) ("shall identify himself"). Since Hiibel refused to identify himself, the issue of whether an identification requirement can only be satisfied by some written proof like a driver's license is not raised in this case.

States v. *Cortez*, 449 U. S. 411, 417 (1981)). *Terry* thus leaves officers "to rely on their own subjective judgment" when deciding who to stop. *Ibid.* Because *Terry* has not been reduced to a series of bright-line rules, the argument goes, the law on when an officer can stop is muddied. See *id.*, at 11. "In essence, police officers proceed with neither guidance nor limitations in assessing what behavior qualifies as suspicious." *Ibid.*

This attacks *Terry* rather than Nevada's stop and identify statute. Bright-line rules are not necessary for an objective standard. "The concept of reasonable suspicion, like probable cause is not 'readily, or even usefully reduced to a neat set of legal rules.' " *United States* v. *Sokolow*, 490 U. S. 1, 7 (1989) (quoting *Illinois* v. *Gates*, 462 U. S. 213, 232 (1983)). Probable cause and reasonable suspicion are also similarly impossible to define precisely. See *Ornelas* v. *United States*, 517 U. S. 690, 696 (1996). This is not some recent innovation, designed to allow police to run wild in the streets. Instead, it recognizes that review of the endless variety of encounters governed by the Fourth Amendment must be flexible. See *Ker* v. *California*, 374 U. S. 23, 33 (1963) (Fourth Amendment standards are not "susceptible of Procrustean application"). The abstract, flexible probable cause standard is still objective, see *Prouse*, 440 U. S., at 654, and so is reasonable suspicion. See *ibid.*, and n. 9. The claim that NRS 171.123 does not restrain officers is inconsistent with *Terry* and the flexible approach that is the cornerstone of this Court's Fourth Amendment jurisprudence.

This argument for a right to anonymity then falls into hyperbole.

> "Thus, under the current state of the law in Nevada, a person can be stopped by the police for engaging in perfectly innocent yet 'suspicious' behavior, asked to identify himself, and if he declines, be arrested and hauled off to jail. This is frighteningly reminiscent of Nazi Germany, where people lived in fear of being approached by the Gestapo and commanded to turn over 'Your papers, please.' " Pet. Brief 11.

This self-refuting statement needs little more analysis. However, it is worth noting that if a state-issued identification card is the defining characteristic of the Third Reich, then many liberal democracies share this characteristic. See J. Eaton, Card-Carrying Americans 121-123 (1986). In any event, *Brown* and *Kolender* insure that NRS 171.123 or similar laws never become random checks for papers. *Terry* prevents random stops, and a validly stopped person cannot be arrested unless there is probable cause that he or she did not comply with a proper identification statute. The Fourth Amendment requires no more.

IV. It is reasonable under the Fourth Amendment to require someone who has been validly stopped under *Terry* v. *Ohio* to provide identification to the officer.

Determining whether the government intrusion is reasonable is the cornerstone of Fourth Amendment analysis. See *Pennsylvania* v. *Mimms*, 434 U. S. 106, 108-109 (1977) (*per curiam*). History is frequently crucial to this analysis. In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was fra[illegible]" *Wyoming* v. *Houghton*, 526 U. S. 295, 299 (1999). History does not help in the present case. While there is some evidence of common law precedent supporting the limited seizure of *Terry* v. *Ohio*, 392 U. S. 1 (1968), see *Minnesota* v. *Dickerson*, 508 U. S. 366, 380 (1993) (Scalia, J., concurring), the pervasive use of identification that is a hallmark of our modern technological society, see *California* v. *Byers*, 402 U. S. 424, 427-428 (1971) (plurality), and did not exist at the common law. Where history is muddled or inapplicable, it is necessary to "evaluate the search or seizure under traditional standards of reasonableness by assessing, on

the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate government interests." *Houghton*, *supra*, at 300. An identification requirement for *Terry* detainees readily satisfies this balancing test.

The minimal intrusiveness of this requirement has already been explained. One's identity is not private, particularly with respect to the government. See Part II, *supra*. The act of producing identifying information involves little real intrusion and does not subject individuals to the risk of arbitrary arrest. See Part III, *supra*. Producing identification is a routine, or even daily event for most people and does little to intrude upon reasonable expectations of privacy.

Society has a substantial interest in identifying *Terry* detainees at the time of the detention. *Terry* stops are a legitimate part of the essential government interest in crime investigation and prevention. See *Terry*, 392 U. S., at 22. Society's interest in identification does not have to differ from this general interest. Instead the question is whether this application of the interest in crime control and detection is sufficiently "'substantial.'" See *United States* v. *Place*, 462 U. S. 696, 704 (1983). An identification requirement enhances the utility of *Terry* stops at little cost to privacy.

The petitioner correctly notes that police on patrol have access to comprehensive computer databases of offenders. See Pet. Brief 24, n. 9. This makes the suspect's identity particularly important for a fast and efficient investigation. Since Hiibel apparently has no prior criminal record, providing his identity would not have solved or prevented a crime in this case. However, if he had a prior record of convictions for sexual crimes or domestic battery, or had an outstanding warrant for kidnapping, then NRS 171.123 could help to solve or prevent a serious crime. Officer Dove had more than reasonable suspicion that a crime of domestic violence was in progress. Checking the detainee's identity against a database of persons subject to domestic violence restraining orders

would be an entirely prudent, proper step for the protection of victims in this situation.

Identification can also help release a suspect more quickly than in an anonymous encounter. If the police are looking for a specific suspect, then providing identification can help absolve the innocent suspect more quickly. This also applies if the police are looking for a particular type of person, such as a professional burglar. If officers are investigating a burglary committed by someone with skill at entering and leaving a dwelling undetected, then an identification check that shows no prior convictions for burglary or lesser included offenses could lead to an early release of the suspect. While innocent suspects should be willing to provide identification out of simple self-interest, Hiibel's foolish belligerence shows that this will not always be the case. Giving officers the authority to arrest those who impede their investigation in this way helps to insure that most suspects will identify themselves. See Note, Stop-and-Identify Statutes After *Kolender* v. *Lawson*: Exploring the Fourth and Fifth Amendment Issues, 69 Iowa L. Rev. 1057, 1074-1075 (1984). Identifying an unwilling innocent suspect allows police to move scarce investigative resources to other leads. When Hiibel refused to identify himself he did not just harm himself, he also harmed society by wasting precious police personnel. Nevada was well within its rights to punish him for impeding the police in this matter.

Identification is also useful in more ambiguous cases. When the police have not clearly absolved the suspect, obtaining identification lessens the cost of release, since it gives officers a chance to initiate contact again if more investigation is warranted. See *id.*, at 1074. If a *Terry* detainee does not provide identifying information, then the officer's options are to continue the detention to further investigate the suspect. While *Terry* stops can be extended to accommodate investigative needs, see *United States* v. *Sharpe*, 470 U. S. 675, 686-687 (1985), there is a limit to how long the suspect can be detained.

At that point, the officer will either release and lose the suspect, or make an arrest that may not be supported by probable cause.

Finding out a suspect's identity is important to effective police work and a key component of *Terry*. Determining the suspect's identity is the beginning of any good investigation and is therefore integral to *Terry*. "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be the most reasonable in light of the facts known to the officer at the time." *Adams* v. *Williams*, 407 U. S. 143, 146 (1972). If NRS 171.123 is an extension of *Terry*'s authority, it is a reasonable one in light of its minimal extra intrusion on privacy.

Allowing officers in the field to require *Terry* detainees to identify themselves substantially helps the officer find the guilty and send the innocents on their way. It allows ambiguous investigations to be continued at a later date so that police may continue the investigation without prematurely arresting the suspect. This is an excellent bargain for society and individual rights and is thus reasonable under the Fourth Amendment balance of interests.

CONCLUSION

The decision of the Nevada Supreme Court should be affirmed.

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Respectfully submitted,

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